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(FIFTH SERIES, VOL. XXX, 1904-1905.)

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LONDON:  
JORDAN & SONS, LIMITED.  
116, CHANCERY LANE, W.C.

1905.

LONDON:  
PRINTED BY ROWORTH AND COMPANY, LIMITED,  
NEWTON STREET, HIGH HOLBORN, W. C.

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# THE LAW MAGAZINE AND REVIEW.

No. CCCXXXVIII.—NOVEMBER, 1905.

## I.—THE PROVINCE OF THE JUDGE AND OF THE JURY.—PART I.

PERHAPS no rule of our law and practice is better settled than this, that to the judge (or judges) belongs the determination of all questions of law, to the jury belongs, subject to the judge's direction, the determination of all questions of fact. This rule is embodied in the well-known maxim: *Ad questionem juris, respondent iudices; ad questionem facti, juratores*—which is at least as old as the time of Sir Edward Coke,<sup>1</sup> and is by him ascribed to Bracton.

Of course, when a judge sits without a jury he is judge both of law and fact. We are so accustomed to this rule and we regard it as so well founded, alike in reason and convenience, that it is difficult for us to conceive that it was ever otherwise. We look upon the rule as so natural and proper, and so consistent with the whole of our judicial system, that we are apt to overlook the fact that it was not until after a severe struggle, of a political, constitutional, and legal character, that this result was arrived at. We are so familiar with the working of the rule, and it works so

<sup>1</sup> See *Coke upon Littleton*, 155 b; where, however, the maxim is given in the negative form, thus: *ad questionem facti non respondent iudices; ad questionem juris non respondent juratores*.

smoothly and so well; it is so well understood, not only by judges and advocates but also by jurymen, that we can hardly believe it possible that it was ever doubted or disputed; nor is it easy for us to see how in other countries, where juries exist, they can manage to get along without such a rule as part of the administration of their law; though as a matter of fact we know that in France it is not unusual, *e. g.*, in cases of duelling, for juries to take upon themselves the decision of the law and say the case is not one of murder, notwithstanding an express enactment of French law that to kill a person in the course of a duel constitutes murder. To do this is virtually to override the law, but in France the jury has always been looked upon as a political as well as a legal institution. At the same time it is not always easy to say exactly what is matter of fact and what is matter of law.

Again, French advocates in criminal cases habitually address the jury upon points of law, a practice which would not be allowed in English Courts. The whole problem is so well stated by the late Mr. Justice Stephen (see his *Hist. Crim. Law*, I, 551-2), that I make no apology for quoting his words at length.

"The right of the counsel for the defence to address the jury on questions of law, as for instance, whether killing in a duel is *meurtre*, is one of the features in which the administration of justice in France differs essentially from the administration of justice in England. In England the judge's duty is to direct the jury in all matters of law, and any arguments of counsel on the subject must be addressed to him and not to the jury. This is not only perfectly well established as matter of law, but it is a fact acquiesced in by all whom it concerns. In France the principle that the Court decides all questions of law, and the jury questions of fact only is, if possible, more strenuously asserted, as will appear immediately, than in England; but in practice French juries

habitually take the law into their own hands, and convict or acquit, not in accordance with the judge's directions—for the judge it will be seen does not direct them—but according to their own views, after hearing the *Procureur-Général* and the prisoner's counsel."

The result is, that advocates for the prisoner in France have a much wider field for comment; but Mr. Justice Stephen adds:—"My own opinion is, that in this matter the English practice is in every way superior to the French."

Yet there was a time when this rule was seriously questioned in England, when for a time it hung doubtful in the balance, when there was a stern and violent struggle between the government of the day and the judges on the one hand, and juries and the people on the other, a struggle which resulted only in establishing the rule more firmly than ever, but at the same time secured the independence of the jury, and did a great deal towards rendering it a popular institution.

It will not be a matter of surprise that this struggle reached its height in the stormy period of the Commonwealth and Protectorate, when revolution was in the air; though, as might be expected, it had begun some time before that period, and a settlement of the question was not arrived at until some time afterwards. How this struggle began and how it ended, and what were its results to modern English law, and especially its effect upon the jury, an attempt to show will be made in the following pages.

#### "LILBURN'S TRYAL."

Two little books have recently come into my possession which have served to draw my attention and direct my reading to this momentous struggle. The first of these is entitled: *The TRYAL of Lieutenant Colonel JOHN LILBURN. By an Extraordinary or Special Commission of Oyer and*

*Terminer at the Guild-Hall of London, on the 24th, 25th, and 26th of October 1649.* [This is referred to hereinafter as "*Lilburn's Tryal.*"] The title page continues as follows:—

"*Being exactly Pen'd and taken in Short-Hand, as it was possible to be done in such a Croud and Noise, and Transcribed with an Indifferent and Even Hand, both in Reference to the Court, and the Prisoner; that so Matter of Fact, as it was there Declared, might truly come to Publick View. In which is contain'd the Names of all the Judges, Grand Inquest, and Jury of Life and Death. By THEODORUS VARAX (sic). The Second Edition.*" Here follows a long quotation from the Books of Esther (iv, 13) and Isaiah (xii, 2, 3, and 4). "*Enter'd in the Hall-Book of the Comptny of Stationers, pursuant to Act of Parliament. London: Printed for and Sold by H. Hills, in Black-fryars.*" The colophon of the book states that it was printed in the year 1710. It is a small book (8vo) of 132 pages of closely printed matter, the type being small.

Although it is only a second edition, there seems to be no reason to doubt its authenticity, or that the first edition was published soon after the trial. On the back of the title page the following certificate is printed:—

"*At the earnest Desire of the Printer I have read this following Discourse, and cannot say but that I do verily believe, the Pen-man of it hath done it with a very indifferent Hand betwixt the Court, and my self the Prisoner: And so far as in me lies, I am for my part willing the World should see it.*

"*John Lilburn.*

"*Southwark, this 28 of  
November, 1649.*"

This certificate<sup>1</sup> affects only the accuracy of the report. It does not tell us who was the reporter.

Incidentally, at the risk of a digression, it may be observed that this little book raises a curious and interesting by-

<sup>1</sup> This certificate is also printed in Howell's *State Trials*, Vol IV, pp. 1420-1.

question. It is, I believe, one of the first reports of a trial taken in shorthand in English, if not the very first. Some of the earlier trials given in the *State Trials*, e.g., those of Sir N. Throckmorton and Sir W. Raleigh, are reported with such surprising fulness and apparent accuracy as to lead one to think that the scribes by whom these trials were reported either practised some system of shorthand writing or were very rapid writers, or blessed with uncommonly good memories, as they give us the *ipsissima verba* of long speeches and dialogues.

A system of shorthand was invented towards the end of the sixteenth century by a man named Willis, and was published in 1602. This system might have been employed for the reporting of *Raleigh's Case* in 1603, but not for the reporting of *Throckmorton's* in 1554.

Assuming it to be true, as stated, that *Lilburn's Tryal* was reported in shorthand, who and what was *Theodorus Varax*, the reporter or editor? *Varax* is evidently a misprint for *Verax*, and the whole name is a pseudonym or *nom littéraire*. It seems probable, although the point is not quite free from doubt, that the reporter of this trial, published under the name of Theodorus Varax (or Verax), was one Jeremiah Rich, the publisher of a system of shorthand called "Semi-graphy." It is now known that this system of shorthand was invented by Rich's uncle, William Cartwright, who first issued it to the world in 1642, and to whom the credit of it is really due; but the system was appropriated as his own (probably with some improvements) by the nephew. Hence it is known as the Rich or Cartwright-Rich method. This system or method had a very wide popularity in its day, and was highly commended by the philosopher John Locke.

The evidence in support of the view that Rich was the reporter of *Lilburn's trial* in 1649 is this: In the Rev. Phillip Gibbs's *Historical Account of Compendious and Swift Writing*, published in 1736 (the first history of shorthand



published), it is stated, in reference to an edition of Rich's system, published in 1654, that "In a recommendatory epistle prefixed to this, and signed by seven Hands, notice is taken of a grand trial of Mr. John Milbourne [Lilbourne] at the Old Bailey, which (*though never printed*) Mr. Lilbourne affirmed, before several Gentlemen, to be *exactly* taken by Mr. Rich; and he would have given the same under his Hand, might he have had Pen and Ink allowed him, which could not be because of his close confinement." The words in italics (*though never printed*) are a mis-statement. The first edition was published in 1649, very soon after the trial, and the second in 1710. This is shown by the fact that in December, 1649, the Government of the day issued orders to seize all narratives of Lilburn's trial. But five years later *Lilburn's Tryal* still appeared in the bookseller's catalogues as "one of the most vendible books." (*Gooch*, p. 203 and p. 255.)

Further, in the life of Jeremiah Rich, given in the *Dictionary of National Biography* (Vol. XLVIII, p. 114), it is stated: "John Lilburne offered to give Rich a certificate, under his own hand, that he took down his trial at the Old Bailey with the greatest exactness."

On the other hand, Dr. Westby-Gibson, in his *Bibliography of Shorthand*, published in 1887, says *Theodorus Verax* was the pseudonym of Clement Walker, who was the author of a *History of Independency*, for which he was imprisoned in the Tower, where he died for his principles in 1651, two years after this trial of Lilburn. Walker was sent to the Tower on the 13th November, 1649. Lilburn's trial took place on the 24th, 25th, and 26th of October, 1649, so that Walker had an opportunity of being present at the trial.

The truth probably is, that the original note of the trial was taken by Rich, who would no doubt be an expert writer of his own (or rather of his uncle's) system, and

that Walker took a check note, which was a common custom in former times, when the art of reporting was imperfectly developed. Walker may afterwards have revised Rich's note and prepared the book for the press.

Professor Gardiner, however, says: "The account of the trial (*i. e.*, Lilburn's trial), printed in the *State Trials*, Vol. IV, at p. 1269, is a reprint of the trial of L. C. Lilburne (E. 584, 9), published by Theodorus Verax, *i. e.*, Clement Walker. This report was taken in the shorthand of the day, according to *Truth's Victory* (E. 579, 12), by Mr. Reade—perhaps John Reade, one of the grand jury—and others." (See footnote to p. 183 of Vol. I of the *History of the Commonwealth and Protectorate*.) May it not be that Reade is a mistake for Rich? If not, perhaps Mr. Reade reported the proceedings before the grand jury, of which he was a member, or all three, Rich, Walker and Reade, may have had a hand in taking the report.

Be this as it may, whoever was the reporter, there seems to be no reason to doubt the substantial accuracy of the report, or that it furnished the raw material for the report contained in the *State Trials*. (See *Howell's State Trials*, Vol. IV, p. 1269), the first edition of which was published in 1719, nine years after this little book (*Lilburn's Tryal*). It is not so long as the report in the *State Trials*. This is due to the omission of some of the original passages taken from Lilburn's writings, upon which the prosecution was founded, which are given at length in the *State Trials*.

#### "LILBURN TRYED AND CAST."

The other book, to which reference is made above, is entitled:—*Lieut. Colonel J. Lilburn Tryed and Cast: or, His Case and Craft discovered*. [This is referred to hereinafter as "*Lilburn Tryed and Cast*."] The title page then proceeds:—*"Wherein is shewed the Grounds and Reasons of the Parliaments*

*proceeding, in passing the Act of Banishment against him, and wherefore since his coming over hee hath been committed to the Tower by the Parliament. Here likewise is laid open the partiall, corrupt, and illegal Verdicts of his Juries, both the former and later. Being to satisfie all those in the Nation that are truly godly and wel-affected to the Peace of the Common-wealth: And to stop the Mouths of others. . . . Published by Authority."*

Then follow the usual Biblical quotations, taken from Job xv, 6, and Deut. xix, 19. "*London, Printed by M: Simmons in Aldersgate-street, 1653.*" This is a copy of the first and only edition. The writer does not divulge his identity, but the book was "published by Authority"—whoever he was. "*The Epistle Dedicatorie*" modestly states, "*We have purposely left out our names, that the Reader may not wrong himself either through prejudice or partiality, but look singly on the matter as it lies before him.*" Prof. Gardiner describes this book (*Lilburn Tryed and Cast*) as "an official narrative of the proceedings against Lilburn, combined with a sharp attack on his character," and states: "It was written, according to Thomason, by 'Cann, the Sectary'; but it probably derived the quotations from Lilburn's speeches as presented in the Notes laid before Parliament on Aug. 27 (1653). Shorthand was not in an advanced state in those days, and we cannot be quite certain of the verbal accuracy of the Notes; but it is highly probable that they represented fairly what Lilburne said." (See footnote to p. 248 of Vol. II of the *History of the Commonwealth and Protectorate*.) "Cann, the Sectary," here alluded to, was apparently John Canne, the Puritan divine and printer, whose life (by Mr. W. E. A. Axon) is given in Vol. VIII of the *Dict. of Nat. Biog.*, p. 44. Referring to the year 1653 (in which year *Lilburn Tryed and Cast* was published) we are told in this life: "He (Canne) was at this time credited with the possession of great influence with the Council of State," a fact which makes it appear probable

that he was entrusted with the task of answering Lilburn and vindicating Cromwell and his party.<sup>1</sup>

This is a rather larger book than the other, consisting of 164 pages (4to); but the type is somewhat larger. It is a violent attack upon Lilburn and all his actions and opinions, written as only an angry sectary and partisan can write. It is overloaded with Latin, Greek, and Scriptural quotations. The object of the book is stated to be, "Because we find Mr. Lilburn boasting oftentimes of his quick and sharp pen, wee have thought good to make one work of it; that is to prevent his future Answer and Replies, in doing so much at once, as not to be troubled any more with him, but to stopp his mouth and put him quite to silence. The man hath been so long a disturber of the peace of the Commonwealth, and acted such a multitude of seditious designs, as we could not in a little, give the Nation a just account thereof."

Commenting on this last sentence some reader has written in the margin these words: "by exposing tyranny, fraud, speculation, and misgovernment."

<sup>1</sup> There is a curious similarity between the epitaphs or epigrams composed upon Lilburn and Canne.

Lilburn died in 1657, and a life of him published the same year contains the following lines:—

"Is John departed, and is Lilburne gone?  
Farewell to Lilburne, and farewell to John.

\*   \*   \*   \*   \*   \*  
But lay John here, lay Lilburne here about,  
For if they ever meet they will fall out."

Canne is said to have died at Amsterdam in 1667. John Shawe, another famous Puritan and a rival of Canne, quotes this "biting epigram":

"Is John departed, as Canne dead and gone?  
Farewell to both, to Canne and eke to John;  
Yet being dead, take this advice from me,  
Let them not both in one grave buried be;  
But lay John here, and lay Canne thereabout,  
For if they both should meet, they would fall out."

The latter lines are obviously a mere copy or new application of the former. It is somewhat strange that practically the same epigram should be written about each of them.

It is, of course, no part of our task to enter into the truth or falsity of the charges brought against Lilburn, or of the counter-charges made by him against his opponents, except so far as the results affect the object we have in view, viz., their effect upon the history of trial by jury.

Professor Gardiner has pointed out the "weakness of the literary supporters of the Commonwealth," and that Milton was asked (in 1649) to answer Lilburn, but he refused to do so, as he (Milton) "had a rooted objection to write except on themes chosen by himself, and he may possibly have felt too much sympathy with Lilburn's vindication of personal liberty to enter the lists against him." (*Hist. of Commonwealth and Protectorate*, Vol. I, pp. 40 and 41.) Certainly if this book was the best defence, apology or justification that the supporters of the Commonwealth could put forth, their literary power was indeed very weak.

The most important part of the book for our purpose is that contained in the last eight pages (pp. 157—164) and headed: "*The EXAMINATION of the JURY who Tried Liev: Coll. John Lilburn, at the Sessions-House in the Old Baily: Vpon Saturday the 20 of August, 1653. Taken before the Councell of State the 23<sup>d</sup> of the same Moneth, in pursuance of an Order of Parliament of the 21.*" The account here given is exactly the same as that contained in *Howell's State Trials*, Vol. 5 (pp. 445—50), and it would appear that both this and the account of the examination given in the *State Trials* were taken from the same source, probably the official note or record of the examination.

### *Lilburn's Life and Character.*

The above-named John Lilburn was in truth a very remarkable man. He was essentially what it is the fashion now-a-days to call a "fascinating personality." With the general incidents of his turbulent life, with his innumerable quarrels, indiscretions, pamphlets, sufferings and triumphs,

we have nothing to do, except from a lawyer's point of view. They belong to the domain of general history and biography.<sup>1</sup>

But some few facts and aspects of his chequered career we must mention for our purpose. He was born at Greenwich about 1615, and sprang from a respectable family in the County of Durham. He was apprenticed to a wholesale cloth merchant, and was successively a bookbinder, a brewer, an officer in the Parliamentary army, where he served with distinction, and probably a soap-boiler. Lord Clarendon, in his *History of the Rebellion*, says of him: "This man, before the troubles, was a poor book-binder, and for procuring some seditious pamphlets against the Church and State to be printed and dispersed had been severely censured in the Star Chamber, and received a sharp castigation which made him more obstinate and malicious against them: and, as he afterwards confessed, in the melancholy of his imprisonment, and by reading the Book of Martyrs, he raised in himself a marvellous inclination and appetite to suffer in the defence or for the vindication of any oppressed truth." All through his life he was a political agitator, but apparently an honest one. By his contemporaries he was called "Free born John," from his love of freedom. David Hume speaks of him (*Hist. of Eng.*, c. ix) as "the most turbulent but the most upright and courageous of mankind." One proof of

<sup>1</sup> There is an excellent short life of Lilburne in the *Dict. of Nat. Biog.* (Vol. XXXIII, pp. 243—250), by Mr. C. Harding Firth, now Regius Professor of History at Oxford, where most of the authorities are collected, and to which I am much indebted, but it was written upwards of twenty years ago (1884). See also Gardiner's *Hist. of the Commonwealth and Protectorate* (3rd ed., 1901), particularly Vol. I, c. ii and c. vii; and Vol. II, c. xviii and c. xxvii; Mr. G. P. Gooch's *English Democratic Ideas in the Seventeenth Century* (1898); *Oliver Cromwell*, by Mr. John Morley (1900); and *Oliver Cromwell and the Rule of the Puritans in England*, by Mr. C. H. Firth (1900), (Heroes of the Nation Series). The best life of Lilburn, however, is to be found in the *Biographia Britannica* (1760), v. 2937—61.

his honesty is that he left the army in 1645, having attained the rank of lieutenant-colonel, and when he might have expected further promotion, "finding that he could not enter the new model without taking the covenant." He was a man of great personal courage and strength of body, as well as fortitude of mind and combativeness, qualities without which he could never have wrung from the juries before whom he was tried the verdicts he won. Up to a certain point he was a strong supporter of Cromwell, and enjoyed his favour and patronage, but after he left the army he became an inveterate opponent of its leaders, especially of Cromwell, by whom, however, on the whole, he was treated with magnanimity and generosity. It was not until he tampered with the army, undermined its discipline, and caused more than one mutiny by the spread of his principles, that he was prosecuted. Here again Lord Clarendon is our authority. He says: "From the time that Cromwell had dispersed that Parliament (the Long Parliament) and was in effect in possession of the sovereign power, Lilburn withdrew his favour from him; and thought him an enemy worthy of his displeasure."

He was not by any means a learned man. Lord Clarendon states that he had "diligently collected and read, all those libels and books, which had anciently, as well as lately, been written against the church; from whence, with their venom he had likewise contracted the impudence and bitterness of their style; and by practice brought himself to the faculty of writing like them; and so, when that licence broke in of printing all that malice and wit could suggest, he published some pamphlets in his own name, full of that confidence and virulency, which might asperse the Government most to the sense of the people and their humour." He knew neither Latin nor French, and apparently no other language than his own. At his trial in 1649, addressing the judges and speaking of the indictment, he said, "I am brought

before you by a piece of parchment that truly I could not read, neither could he do it that showed me (I mean the Lieutenant of the Tower); for admit that *if I did well understand Latin, as indeed I do not: only some ordinary words*, yet it was in such an unusual strange hand that I could not read it." (*St. Tr.*, IV, 1282.) Later on, referring to the well-known maxim *Actus non facit reum, nisi mens sit rea*, he says: "Sir, if you please to do me the favour but to English it, and explain it to the jury? For though I understand the substance of it, yet I am not exactly able to English the Latin, but only to understand the sense of it." (*St. Tr.*, IV, 1390.) In the same trial he says: "I have read the most part of the laws that are in English which I take to be the foundation of all our legal privileges; . . . And as for those laws, or rather the practic (*sic*) part of those laws that are in French and Latin, I cannot read them and therefore much less understand them." (*St. Tr.*, IV, 1288-9.) In another place he quotes the "Declared Judgment of Sir Edward Coke, that great oracle of the Laws of England, whose books are published by Special Order and Authority of Parliament for good law," and cites the third part of his *Institutes*. The first edition of *Lilburn's Tryal*, published in 1649, under the name of Theodorus Varax, had prefixed to it a full length portrait of Lilburn, representing him pleading at the Bar with Coke's *Institutes* in his hand. He was continually referring to Magna Charta and The Petition of Right. Thus, he says, in the same trial (1649): "I have read the Petition of Right, I have read Magna Charta, and abundance of laws made in confirmation of it." (*St. Tr.*, IV, 1273.) To make up for his lack of learning, he had good natural parts; a clear, acute, and penetrating mind; a quick and ready tongue; and great determination.

There is no trace in Lilburn's writings of wide philosophical or historical reading. His political opinions, such as they were, seem to have been evolved out of his own



inner consciousness as the result of his experience of life and reading of the Bible.

- His eldest brother, Robert Lilburn, was one of the Regicides. But his own attitude with regard to King Charles I is thus stated by Professor Firth: "He refused to take part in the king's trial, and, though holding that he deserved death, thought that he ought to be tried by a jury, instead of by a high court of justice. He also feared the consequences of executing the king and abolishing the monarchy before the constitution of the new government had been agreed upon and its power strictly defined."<sup>1</sup> After the king's death, however, he seems to have seen that Cromwell was as much a tyrant as Charles I, the only difference between them being that the king had a legal title to the crown by descent, while Cromwell was a usurper—that, in fact, the new master was worse than the old. He saw clearly after Pride's Purge (Dec. 6th, 1641) that the Parliament, thenceforth called the Rump, no longer represented the nation, but that it was governed by the army through Cromwell and his partisans. "So bitterly was Lilburn opposed to the rule of the sword," says Professor Gardiner, "that he preferred a restoration of the monarchy on fair conditions to a continuance of the present usurpation of the people's authority." (*History of Commonwealth and Protectorate*, Vol I, p. 180.)

The fact was, the Puritan party itself was split into two sections, which might be called respectively the civil and the military. At the head of the military section was Cromwell, who foresaw the danger of the Royalist party again asserting itself and taking advantage of the split, and who therefore wished to gain time in order to consolidate the new government which had been won by years of hard fighting. Lilburn was the recognised leader of the civil section, who were in a hurry to bring about the

<sup>1</sup> *Life of John Lilburn: Dict. Nat. Biog.*

millennium through the medium of a democratic Parliament. The opponents of Lilburn's section called him and his followers Levellers, and alleged that they were Communists; but such allegation does not appear to be true. "The bulk of the Levellers," says Professor Gardiner, "stood up for an exaggeration of the doctrine of Parliamentary supremacy" as against the army. Lilburn himself was certainly not a socialist, and vigorously protested against the application of the term Levellers to him and his comrades, if it was understood to include a desire for "the equalling of men's estates and taking away of the proper right and title that every man has to what is his own." On the contrary, they said they were Levellers only so far as they were "against any kind of tyranny" and the "levelling aimed at" was "equal justice to be impartially distributed to all." (*Gooch*, p. 141.) Mr. John Morley says that "the Levellers anticipate Rousseau" just as "Oliver and Ireton recall Burke." (*Oliver Cromwell*, p. 233.)

Lilburn was an irrepressible and effective pamphleteer. Pamphlet after pamphlet in support of his views, written either by himself alone or with the assistance of others, appeared with alarming frequency. Like the Kingsley family, he "had ink in the veins." It was impossible to prevent him writing, even when in the Tower. The language of these pamphlets was strong and to the point. When Parliament sent forty musketeers to seize his books and papers, he so terrified the soldiers by the strength of his language, that they came away without making any serious attempt to carry out their orders—and Cromwell's soldiers were not easily terrified. At his trial in 1653 he so overwhelmed Mr. Prideaux, the Attorney-General, with reproaches and opprobrium, that he fairly drove him off the field. Yet strength of language was not his only rhetorical weapon. On occasion he could rise to the height of true eloquence, *e.g.*, when he speaks of the

Long Parliament as it existed soon after it was called together,—“in their primitive purity and non-defilement, when they acted bravely and gallantly for the universal liberties and freedom of this nation (and not self-interest), when they were in the virginity of their glory and splendour.” (*St. Tr.*, IV, 1296.) And in one of his writings he refers to Parliament as “the very marrow and soul of the people’s rights.” (*The Apprentice’s Outcry*, p. 2.)

His personal popularity was unbounded. Mr. G. P. Gooch speaks of him as “the most popular man in England,” and says that “by its injudicious treatment of him Parliament was arraigning against itself a force which only awaited an opportunity to sweep it away.” (*English Democratic Ideas in the Seventeenth Century*, p. 146.)

Especially notable was his popularity with the women of England, who petitioned Parliament on his behalf, and even threatened to have Cromwell’s life if the lives of Lilburn and his associates were taken.

He died in 1657, having been for some time in receipt of a pension from Cromwell. Towards the end of his life he became a Quaker.

Professor Firth thus estimates Lilburn’s character: “Lilburn’s political importance is easy to explain. In a revolution where others argued about the respective rights of King and Parliament, he spoke always of the rights of the people. His dauntless courage and his powers of speech made him the idol of the mob. With Coke’s *Institutes* in his hand he was willing to tackle any tribunal. He was ready to assail any abuse at any cost to himself, but his passionate egotism made him a dangerous champion, and he continually sacrificed public causes to private resentment.”

In some respects he reminds us strongly of the late Mr. Charles Bradlaugh, though no two men could be more diverse in their religious views.

Mr. John Morley, in the warmth of his admiration for

Cromwell, seems to be somewhat unjust to Lilburn. He thus describes his characteristics: "The cry of the political levellers was led by Lilburn, one of the men whom all revolutions are apt to engender—intractable, narrow, dogmatic, pragmatic, clever hands at syllogism, liberal in uncharitable imputations and malicious constructions, honest in a rather questionable way, animated by a pharisaical love of self-applause, which is in truth not any more meritorious than vain love of the world's applause; in a word, not without sharp insight into theoretic principles, and thinking quite as little of their own ease as the ease of others, but without a trace of the instinct for government or a grain of practical common sense. Such was Lilburn the headstrong, and such the temper of thousands of men with whom Cromwell had painfully to wrestle for all the remainder of his life." (*Oliver Cromwell*, p. 291.) Elsewhere he speaks of Lilburn as "the foe of all government, whether it was inspired by folly or by common sense." (*Ib.*, p. 366.) The fact that Mr. Morley takes the trouble to analyse his character so minutely shows that Lilburn was no ordinary man.

Professor Gardiner is much more just to Lilburn. After quoting a long passage from one of his pamphlets, viz., the *Agreement of the People*, he says; "It is impossible to treat the man who could write these words as a mere vulgar broiler. Unfortunately he had no sense of the line which divides the practicable from the impracticable, and he was at the mercy of impostors who persuaded him, often on very little ground, that his political opponents were villains of the deepest dye." (*History of Commonwealth and Protectorate*, Vol. I, pp. 180-1.)

Such was the character of the man who forms the central figure in the two great trials which we propose to consider, trials of great importance in the history of our law, and which, I believe, proved to be the turning point of our jury system.

## LILBURN'S VARIOUS TRIALS.

It does not fall to the lot of every man to be tried for his life four times and escape scot free on each occasion. Yet such was the peculiar experience of John Lilburn. At his trial in 1649 he was able to say, "I have been several times arraigned for my life already." This was in addition to the proceedings against him before the Star Chamber in 1637, which were due to his acquaintance with John Bastwick, the Puritan divine, and his being concerned in the printing of Bastwick's *Litany*. Of these proceedings (they could scarcely be called a trial) we have an account written by himself, which is contained in the third volume of the *State Trials* (pp. 1316-68). This account, says Sir J. F. Stephen, is "probably substantially correct, and extremely lively and circumstantial." (*Hist. Crim. Law*, Vol. I, p. 343.) On this occasion he had a fellow prisoner, by name John Wharton, a hot-presser (in a double sense), a very amusing old man, whose great object in life seemed to be "to pepper the bishops." Wharton appears to have been Lilburn's political mentor. With his sentence by the Star Chamber, and the subsequent vote of the House of Commons (in 1641), that it was "illegal and against the liberty of the subject," and also "bloody, wicked, cruel, barbarous and tyrannical," we have nothing to do, since he was not then tried by a jury, and we are dealing with trial by jury—not with the arbitrary proceedings of that "Court of Criminal Equity," known as the Star Chamber.

His first trial for his life was in May 1641, when he was arraigned "before the House of Peers," as he himself says, "for sticking close to the Liberties and Privileges of this nation and those that stood for them, being one of two or three men that first drew their swords in Westminster Hall against Colonel Lunsford and some scores of his associates. At that time it was supposed they intended to cut the

throats of the chiefest men then sitting in the House of Commons." Of this trial there is no report, but he escaped without punishment. The real ground of his prosecution on this occasion, which put him in peril of his life, was, "speaking words against the King"; but the witnesses disagreed and therefore the charge was dismissed.

His second trial for his life was at Oxford in 1642, after having been taken prisoner by the King's forces at Brentford, as to which he says, "I was again arraigned as a traitor before the Lord Chief Justice Heath, for levying war at the command of the Parliament against the person of the King." Of this trial also there is no report, except the account which he himself gives of it in the course of his trial in 1649. (See *St. Tr.*, IV, 1272.) On this occasion also he escaped death, as the Parliament threatened reprisals, *i. e.*, to treat any Royalist officers who fell into their hands in the same way as Lilburn was treated—an instance of the *Lex Talionis*.

In 1646 he was imprisoned by the House of Lords for libelling the Earl of Manchester. Against this sentence he appealed to the House of Commons as "the supreme authority of the nation," and denied the authority of the peers on the ground that they were not elected by the people. The House of Commons refused to hear him, and he then appealed to the "universality of the people" as "the sovereign lord" from whom the Members of the House of Commons derived their power and to whom they were liable to render an account for its use. At a later date (in 1649), as we shall see, he was driven by force of circumstances to put this last appeal into effect, to deny the legality of the laws passed by the House of Commons alone (or rather that mutilated portion of it, known as the Rump), and therefore the legality of the tribunal appointed to try him, and to appeal to a jury of his fellow countrymen, as the final arbiters of law, life and liberty. The incident above

mentioned, however, well illustrates his political opinions in 1646.

His third trial for his life was in 1649, and the fourth in 1653. These are the two trials with which we propose to deal in some detail, so far as they bear upon the subject of this paper. But before doing so, let us glance briefly at two other trials of minor importance which preceded those of Lilburn, for the purpose of showing the position and powers of juries before the Commonwealth. These two trials are the only two cases reported, before Lilburn's trial in 1649, in which English juries ventured to bring in a verdict of not guilty. Probably there were other instances of acquittal at the assizes and sessions, of which there are mere bare records but no full reports. The old criminal law was shockingly cruel, both in theory and practice, but it must not be forgotten that the judges were mostly humane men, better than the system which they had to administer, and they had a high ideal of their duty to act as counsel for the prisoner when he was not defended by counsel. Notwithstanding this and the existence of juries, to stand between the Crown and the prisoner, one cannot help but think that a frightful amount of injustice and cruelty must have been perpetrated formerly in the name of the law.

#### THE TRIAL OF LORD DACRES.

This case is reported in the first volume of *Howell's State Trials*, at page 407, apparently for the sole reason that it is the first reported case of a verdict of acquittal. It took place in the year 1535 (27 Henry VIII). The report, if report it can be called, is a very short one consisting only of two extracts from contemporary historians, viz., Hall's and Lord Herbert's *Life of Henry VIII*, and occupies less than two columns of Howell. These extracts are preceded by a note on this trial by the learned Mr. Hargrave, in the

fourth edition of the *State Trials*, printed in the year 1775, to the following effect: "In ancient times, more especially in the reign of Henry VIII, when, from the devastation made by the Civil Wars amongst the ancient nobility, and other causes disturbing the balance of the constitution, the influence of the Crown was become exorbitant, and seems to have been in its zenith, *to be accused of a crime against the State and to be convicted were almost the same thing.* The one was usually so certain a consequence of the other, that, exclusively of *Lord Dacres' Case* in the reign of Henry VIII, and that of Sir Nicholas Throckmorton in his daughter Mary's, the examples to the contrary are very rare."

It has been well said that "the most valuable information to be derived from the perusal of the *State Trials* relates to the administration of justice. We may there see how the law was dispensed in State prosecutions through a long series of ages." And it is much to be regretted that there exists no similar account of civil proceedings, giving us a complete picture of a civil trial at different periods of our history, the pleadings, speeches of counsel, the evidence, the summing-up of the judges, the verdict of the jury, etc. We are therefore left to glean our information about such matters from an immense number of separate and detached reports of cases, most of which deal with only one point of law or practice, and are reported only so far as is necessary to illustrate that point. Perhaps the absence of such a work is easily explained, inasmuch as in the very nature of things civil proceedings do not as a rule interest the public at large, but only those directly interested in them and the legal profession, and have not that deep and abiding human interest which criminal proceedings nearly always possess. Moreover the bulk of such a work would be very great.

It may not, however, be out of place to mention here a caution which is to be found in a footnote in the ninth edition of *Best on Evidence*, at page 97: "Too much reliance



must not be placed on that valuable work called the *State Trials*, as presenting a correct picture of English tribunals before the Revolution. It should not be forgotten that most of the cases there recorded were prosecutions for high treason, and took place in times of great excitement." The late Mr. Justice Stephen has some valuable remarks of a similar character in his *History of the Criminal Law* (Vol. I, p. 345). "It is difficult to say how far the cases reported in the *State Trials* can be regarded as fair specimens of the common Courts of the administration of criminal justice, as it is not unnatural to suppose that in cases in which the Government was directly interested prisoners might be treated more harshly than in common cases." Still the *State Trials* are the only reports we possess, and we must make the best use we can of them.

The charge against Lord Dacres was one of high treason, and, being a peer, he was tried before his peers, in the Court of the Lord High Steward, who on this occasion was the Duke of Norfolk. We do not know the facts upon which the charge was based. But we know from Hall's account that he was "brought to the barre with the axe of the Tower before him," and "after his inditement red" he "not only improved the sayd inditement as false and maliciously devised against him, and answered every part and matter herein contained, but also manly, wittily, and directly confuted his accusors, whiche there were ready to avouch their accusacions, that to their great shames, and to his great honor, he was found that day by his peres not giltye, which undoubtedly the commons excedyngly joyed and rejoysed of, insofmuche as there was in the hall at these woordes 'Not giltye,' the greatest shoute and crye of joy that the like no man living may remember that ever he heard."

The other authority (Herbert) states that the principal witnesses produced against him by his accusers "were some

mean and provoked Scottish men, so his peers acquitted him as believing they not only spoke maliciously but might be easily suborned against him," he having been the Warden of the Marches and having "by frequent inroads done much harm to that country." The authority then proceeds:—"And thus escaped that lord to his no little honour, and his judges, as giving example thereby how persons of great quality, brought to their trial, are not so necessarily condemned, *but they may sometimes escape, when they obtain an equal hearing.*" There is a depth of meaning in these last few words which we have italicised.

Lord Dacres seems to have owed his lucky escape to two causes, viz.: (1) His manly, witty, and direct defence; (2) The fact that the witnesses against him were Scotchmen. Probably, also, the fact that he was tried by a jury of his peers had a good deal to do with it. The Court of the Lord High Steward is the Court which tries peers for treason and felony when Parliament is not sitting. The indictment must first be found by a Grand Jury of freeholders in the King's (Queen's) Bench, or at the Assizes before a judge of Oyer and Terminer. It is then removed into the Court of the Lord High Steward by a writ of *certiorari*. The Lord High Steward, who is appointed *pro hac vice*, is the judge of the Court, and not merely its president. In the reign of Henry VIII, the jury in this Court consisted of twenty-three peers of the realm, who returned a verdict by a majority, viz., twelve. This practice threw great weight into the hands of the Crown and its great officer, the Lord High Steward, who used to summon the jury, as they might select only such peers as belonged to the then predominant party. Accordingly, it was provided by 7 Will. III, c. 3, that upon trials of peers *all* the peers who have a right to sit and vote in Parliament shall be summoned, at least twenty days before such trial, to appear and vote therein. [See Blackstone, *Comm.*, 12th ed. (1795). Ed. by Christian, pp. 261-3.]

It will thus be observed that Lord Dacres was tried by a jury, though not by an ordinary petty jury. A coroner's jury still consists of not less than twelve and not more than twenty-three.<sup>1</sup>

No question of law arose in this trial—the prisoner appears to have been acquitted simply on the facts; but the case throws a strong light on the power of the Crown and its influence with juries in early times.

G. GLOVER ALEXANDER.

*(To be continued.)*

## II.—THE DEAD HAND.

NO little light has been thrown quite recently on the difficult subject of this article. The House of Lords has held that a bequest of £100,000 to trustees to distribute among such religious or charitable institutions as they should think fit was void for uncertainty; bequests for masses, not specially directed to be public, for the repose of the souls of the testatrix and her children have been held void in Ireland; statistics have been published to show that the Dead Hand in one year (1903) gave 9s. 10d. out of every pound received by the London Hospitals; the wills of two great lawyers have been much criticised, the one for a multiplication of codicils, and the other for a confusing insertion; and last, though not least, the President of the Probate Division of the High Court has spoken from the Bench<sup>2</sup> as follows:—

Everyone is entitled to make his or her will at any time or place he or she may choose, subject to certain legal formalities. Nevertheless I have often thought, having regard to the number of deathbed wills which come before the Court, that such testamentary documents should be executed in the presence of some public official or notary.

<sup>1</sup> See Sect. 3 of the Coroners Act 1887.

<sup>2</sup> In the summing up in *Pearson v. Allan*, *Times*, July 13th, 1905.

Let us consider at once whether or not, and if so, to what extent, it is desirable that this weighty judicial dictum should bear legislative fruit. A dislike of deathbed wills is no new thing, and it is obvious that most serious illnesses, whether mortal or not, however much they may dispose the invalid to the making of a will, in most cases must entirely unfit him for the proper consideration of its details. The matter has been strikingly handled both by the Charitable Uses Act 1735, in England, and the law of Deathbed in Scotland, and the curious fact that recent legislation has effected repeals in both cases<sup>1</sup> is perhaps some evidence that deathbed wills do not require special legislative treatment. The preamble of the Act of 1735 recited that:—

Gifts of lands in mortmain are prohibited or restrained by Magna Charta and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs.

The Act, which avoided gifts of land, or of money to be laid out thereon, for charitable uses, unless made by deed at least 12 months before death, to take effect immediately, was the work of Sir Joseph Jekyll, M.R., when member for Reigate. He afterwards distinguished himself by bequeathing, subject to his wife's life interest, £20,000 towards the reduction of the National Debt, thereby laying himself open to the foolish reproach of the wise Lord Mansfield (an extract from whose own will is given on page 301 in the May number of this Magazine), that "he might as well have attempted to stop the middle arch of Blackfriars Bridge with

<sup>1</sup> The "Charitable Uses Act 1735"—commonly called the Mortmain Act—was repealed by the Mortmain and Charitable Uses Act 1888, and the Mortmain and Charitable Uses Act 1891 allows land to be devised for charitable uses, directing, however, that it must be sold.

The Scots law of Deathbed is repealed by 34 & 35 Vict., c. 81, "An Act to abolish Reductions *ex capite lecti* in Scotland"—an Act itself repealed by the Statute Law Revision Act 1883—the saving clause of which (see Bell's *Principles*, Vol. II, at p. 1082) prevents the revival of the law repealed.

his full-bottomed wig." There was afterwards a partial statutory cancellation of the will itself in favour of the residuary legatees.

The Scots law of Deathbed, as amended by statute in 1696, though it did not invalidate deathbed grants, allowed the heir to get them set aside on proof that the grant was executed within sixty days of death, and that at the time of execution the grantor was sick of the illness which caused death. Though revival of either the English or Scots system may be undesirable, some restriction on deathbed wills appears to be required beyond the mere permissive proof in solemn form of the present law, which draws no distinctions for age or bodily health, but presupposes an equal capacity of all above 21 years of age. Against the introduction of an official overseer of the deathbed will it must be borne in mind (1) That such a person would be in nine cases out of ten a stranger to the testator and ignorant of his affairs, and (2) that the ascertainment of the crisis justifying his intervention would be extremely difficult. One solution of the problem would be to disqualify for making a will, or at all events for altering it except by reason of the death of a legatee, after the testator had reached a certain age; another to increase the number of requisite witnesses after that age, following the analogy of the Roman law, which increased the number of witnesses in the case of a blind testator. Another solution would be to make the medical attendant a necessary witness. But whatever might be the precautions taken, intestacy would very frequently be preferable to a deathbed will. The Statute of Distributions has been only twice amended since it was passed more than 200 years ago (and that only in two small particulars), and has appeared to give general satisfaction.

But of course the main remedy for the evils which a deathbed will is apt to cause is the careful exercise of the testamentary power in the time of health. "Men should

often be put in remembrance," it is written in the Prayer Book Order for the Visitation of the Sick, "to take order for the settling of their temporal estates, whilst they are in health." Intestacy is a frequent cause of confusion and misunderstanding, and whereas an executor can act at once and long before probate on the strength of a will, an administrator can act only on the strength of administration granted. Especially is this distinction important in the case of a landowner. The Land Transfer Act of 1897 has constituted his personal representatives his immediate successors in law. Who succeeds an intestate during the period which must elapse before administration can be granted? Who can give a discharge for rent or sue for it? Who can give, and to whom should be given a notice to quit? The answers to this question are too many to discuss here. One of them is, that all the Judges of the High Court constitute a body of interim administrators; another that the heir-at-law stands in the shoes of his deceased predecessor.

The inconveniences of intestacy are so great, that an increase of duty on intestate estates might well be imposed. From 1815 to 1880 these duties were higher, but the Customs and Inland Revenue Act 1880 equalised them with the Probate duties in the case of Probate, notwithstanding a demurder by Mr. Gladstone, and protests by Mr. Gregory and Mr. Dodson (afterwards Lord Monk Bretton), the latter observing that:—

As regards the question of testate and intestate estates, I think the latter may fairly be called upon to pay more than the former. It is advisable that people in all cases should make wills. If they leave the distribution of their property to the law, I think the law is fairly entitled to inflict on them something of the nature of a fine.

Probate and Administration Duty being by the Act of 1894 merged in Estate Duty, a new and separate Administration Duty would have to be charged, and there would be no injustice in graduating it in proportion to the value of

the estate administered to, as the inconvenience to survivors caused by the avoidable omission of the intestate to make a will would increase in the same proportion. Such an alteration of the law is all the more desirable because, for obvious reasons, there are not many cases in which, except on quite general moral grounds, one man can properly urge another to make a will. It is perhaps unfortunate that so much law as would include the Statute of Distributions amongst other elementary law, is not compulsorily taught at the Universities. Few young men are aware that if they make no will their fathers will come into possession of all that they have, and not every married man who has made a will before marriage is aware that marriage has revoked it. The elements of the law of testamentary power should be known to every person whom the law invests with it; the details of such law can only be known to lawyers, but it is undesirable that they should have to be explained to clients wholly ignorant of their elements.

In conclusion, let us inquire what alterations, if any, are required in our law of testamentary disposition. It is, as has been seen, unique in Europe, and one of the three countries of the United Kingdom has not adopted it. In England and Ireland alone may a rich man leave his wife and children penniless, and give what is at least in part justly theirs to the prolongation in luxury of the lives of his horses or his dogs, or to the re-establishment of the doctrines of Joanna Southcote. In Ireland the Case law appears to allow any amount of money to be left for masses for the repose of a testator's soul, provided only that<sup>1</sup> the masses are directed to be said in public. In Scotland the law of Deathbed, which, with all its pedantic obscurities of construction, was a very wholesome one, has been unwisely abrogated by statute, and now throughout the United Kingdom

<sup>1</sup> See *Attorney-General v. Delany* (Ir. R., 10 C. L. 104); *O'Hanlon v. Cardinal Logue*, cited in the *Law Times* of July 22nd, 1905.

wealth illimitable may be disposed of by the wills of the aged, the helpless and the superstitious, without check or limit, save that which is provided by the ability of wronged survivors to sustain the burden of an expensive and difficult proof that the testator's disposing power was not sufficient. Nearly 50 years have elapsed since the passing of the great Wills Act of 1837. Since that time we have had three Reform Acts, and wealth, population and electorate have enormously increased. The still unrepealed clause of Magna Charta by which there are saved to a man's wife and children their "reasonable parts," has, it is true, never been invoked in the defence of a defrauded widow and her children, and text-book authority is to the effect that it would be invoked in vain. But it has been republished by authority in a twice revised statute book, and no rule of law is more certain than the rule that mere non-user does not work a repeal of an Act of Parliament. Is it so certain that the Wills Act has worked an implied repeal of Magna Charta that it is desirable to leave this point to be decided by litigation, perhaps next year, perhaps in twenty years' time, perhaps not until some gross scandal may have stimulated us into hurried legislation? Would it not be better to consider at once what is just and right, to consider it by the light of the almost universal legislation otherwise elsewhere, and to legislate accordingly?

The question of deathbed wills is a far more difficult one, but here, too, some legislation appears to be needed; and the recent weighty remarks of Mr. Justice Barnes, cited at the commencement of this article, emphatically point the way to some change or other being necessary. On the whole, the best change would seem to be in the direction of limiting the age, not at which a will should be made, but that at which a will once made should be altered. Not, of course, that it would be desirable to enact that after a certain age a will should not be altered at all, since very



many circumstances, besides the obvious one of the death of a legatee, may make alteration absolutely necessary. But it might well be provided that a will once made should not be altered without a recitation of the reasons for the alterations. The necessity of reciting such reasons might often (and properly) induce the testator either to modify or retract his alteration. But supposing a certain age to be fixed, what should that age be? The difference of strength in individuals renders this question very difficult, but not insoluble. For the leading principle of the law on this subject should be that society makes an enormous concession to the individual in allowing him to make a will at all. I am inclined to fix the age at 75; and at the same time, if age is to be meddled with at all in this important matter, I incline to the view that to postpone the power of disposition in the case of the very young would be almost as much for the interest of the community as it would be to hasten it in the case of the old. Twenty-five would be a good age to begin will-making, after some experience of the responsibilities of ownership of property, which four years of majority cannot fail to bring with it. Until the age of 25 is reached, the Statute of Distributions may well be left to take effect. To summarise:—

- (1) Let the law of Scotland,—the law of most if not all civilized countries except England and Ireland—and of Magna Charta, by which a man may not deprive his wife and children of all his personal property, be expressly made the law of England and Ireland.
- (2) Let the duties on intestacy be increased.
- (3) Let the duties on legacies to charitable uses be increased.
- (4) Let executors be remunerated by a per-centage on the estate realised.
- (5) Let the power of disposition commence at 25.

- (6) Let the age of alteration; without recited reasons, cease at 75.
- (7) In Ireland let bequests for masses for the repose of the testator's soul be made invalid, whether the masses be said in public or not.

J. M. LELY. '

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### III.—REFORM OF THE PATENT LAW.

THERE are few questions—if any—of law reform which merit more careful attention at the hands of British Statesmen than the reform of the Patent law. Considerations the most diverse combine to press the subject into notice. Looked at in the light of its industrial importance it is of first-class magnitude, as a branch of jurisprudence it has the special interest attaching to a department of law which is an indigenous product of this realm, and among the noblest contributions made by British science to the theory of law; while, finally, considered as a field for the exercise of the reformer's skill, it presents such an opening as seldom offers for the doing of unmingled good. Nor can it be said that this great subject has escaped attention. Always more or less under discussion, it has been the subject of half-a-dozen Acts of Parliament within the last two and twenty years, while the public interest has been quickened by a continuous crop of litigation. Yet the regenerative processes have by no means kept pace with the progress of decay, and at the present time reform is demanded far less to meet new exigencies than to restore the integrity of a corrupted theory and deteriorated practice of the law.

The mischiefs now complained of may be detected in every branch of Patent law, but most easily in a perplexed and unsettled doctrine concerning subject matter;

an illiberal and mischievous practice in the granting of injunctions, and a very unsatisfactory method of trying questions of scientific fact. In all these respects reform is urgently needed, and reform in directions for the most part identified by very obvious considerations.

To take first the question of Subject Matter. Here it is of very small consequence where the defining line is drawn, provided that it be drawn upon the basis of some clear distinction. In the Statute law the definition is precise, and the distinction as clear as clear can be. The subject matter of a grant must be a "new manufacture." The word "manufacture," by judicial construction, includes both processes and products of manufacture, and, given a new manufacture in that sense, the only other qualification which the Statute law lays down is that the grantee must be the true and first inventor of that new manufacture. "Inventor" here signifies "projector," a perfectly natural, if somewhat special, meaning of the word. How "inventor" came to be used in place of the apter word "projector" is an interesting story. The Statute of Monopolies was passed by James I, very reluctantly and under great Parliamentary pressure. To render it as acceptable as it might be to that autocratic monarch, the draughtsman of the Bill—who probably was Sir Edward Coke—based it, so far as possible, upon the "King's Book," that is to say, upon a certain "Declaration of His Majesty's Royal pleasure concerning Bounty," which King James had been persuaded to publish in 1610 and to re-issue in 1619. In this "Declaration" the king proclaimed that he would not be petitioned for grants of monopolies, and strictly forbade all his subjects to move any such petitions save for grants falling within the following exception.

"Projects of new invention so they be not contrary to the law nor mischievous to the State by raising prices of Commodities at home, or hurt of trade or otherwise inconvenient." <sup>1</sup>

<sup>1</sup> *Book of Bounty*, p. 21.

The Statute of Monopolies, which received the royal assent four years after the re-issue of this royal declaration, was closely modelled upon its terms, and hence, the grantee is spoken of in the Act, as in the Declaration, under the description of the inventor. But what he invents is the new manufacture; in other words, the projected manufacture. There is no discrepancy here between the Declaration and the Statute. A project of new invention is a newly invented project, just as a project of "large scope" would be a comprehensive project, or a project of great importance would be an important scheme. The novelty is to be sought in the manufacture, the inventor's merit in the novelty of his project; that is to say, the project is new if it concerns a new manufacture, and the idea that ingenuity, in a scientific sense of the word, is any condition of the grant, is a mere misconception which has grown up in recent times. The statute, still unrepealed, and therefore still authoritative, says nothing whatever, either expressly or by implication, about scientific ingenuity. The criterion has been introduced by the judges, first as a test of novelty, then as an ingredient of subject matter, so that now it may be said to be the whole question of validity. When the "state of the art" is made manifest by the evidence, the judge asks himself: Did it require something which I am prepared to applaud as inventive ingenuity to pass from what was known to what was projected? If so, the grant is good; if not, bad. The novelty, however undeniable, may be ignored if no exercise of imagination was involved in the act of developing the new out of the old. And the novelty being thus put out of view the grant itself fails for want of subject matter.

This innovation leads at once to extreme confusion both of language and of ideas. The Act of Parliament requires that the grant should be made not only for a new manufacture but also to the first inventor. Now, if the inventor

be the inventor of a newly-invented project of new manufacture, this means the first applicant for a patent, provided his priority is priority in bringing a project to maturity and not a mere outstripping in the race for a grant of the true projector. Somewhat on these lines the practice has been settled under the pressure of necessity, but by a logical process which nobody pretends to understand. A projector who has derived the so-called "invention" from abroad has been held to be an "inventor" within the meaning of the Act by judges who apparently thought that they were straining the language to the limit of its capacity.<sup>1</sup> But they could not help seeing that if any patentee deserved his grant it was the projector, who, finding a manufacture carried on to profit in a foreign country, projected its introduction here. Such a projector was in truth and in the fullest sense of the words the inventor of a project of new invention, and therefore an inventor in the authentic sense of the Statute of Monopolies. There is little reason, therefore, for the judicial scruples which have been frequently expressed concerning the interpretation which admits an inventor in this sense to the benefit of the Patent law, but, this notwithstanding, our Courts have adopted and approved with painful doubts and grievous difficulty the dictate of the plainest common sense and the clear meaning of the statute.

As soon as the guidance of obvious necessity forsook them, they grew uncertain and obscure. The question as to publication by a patentee of his "invention," and how that affects his patent subsequently sealed, has proved too tough a problem for solution. The dictum of Fry, L.J., in *Humpherson v. Syer*, is the clearest judicial utterance on the point.

"The question," says he, "which I have propounded to myself in the present case is this: Is it the fair conclusion from the evidence that some English people, under no obligation to secrecy arising from confidence or good faith towards the patentee, knew of the invention at the date when the plaintiff took out his patent. That appears to me to be the question." (4 R. P. C. 414).

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<sup>1</sup> See the judgment of Jessel, M.R., in *Marsden v. Saville Street Foundry Co.*, L. R. 3 Ex. D. 205.

But here there is no principle discernible. What difference can the fiducial relations between communicator and communicatee make to the public? If the recipient, though free to use his information, does not in fact become a projector in his turn, the public gain no advantage by the communication and cannot be damnified, but may be benefited, by the grant. Why in such circumstances should it be refused? If the recipient of the communication, though in honour bound to guard his information as his secret, does in fact make it public, the judges recognise that the doctrine of fiduciary obligation cannot be pressed to the detriment of the public.<sup>1</sup> Thus a rule which on principle is simple and unmistakeable is rendered involved and only partially intelligible by the substitution of inventive ingenuity for a new manufacture, as the meritorious cause of the grant, and of the inventive genius for the first projector as the qualified grantee.

But all this would not matter much if the judicial innovation led only to a somewhat arbitrary and intricate code of rules. Lawyers can master rules however intricate, and will do so if necessary. It is when the rules break down and give place to the arbitrary opinion of a judge that the mischief becomes intolerable; and this point is reached when inventive ingenuity is made the test of subject matter, for inventive ingenuity is what never has been and never will be defined. With this for his criterion the judge acts at his discretion.

How capricious this discretion is let the following illustrations show. In *Williams v. Nye* the Court of Appeal held that there was no patentable subject matter in converting a known form of mincing machine into a sausage-making machine by combining the first-named machine with a sausage-filling mechanism. The result was admittedly an improvement in sausage-making machines, and in that

<sup>1</sup> *Patterson v. The Gas Light and Coke Company*, 3 A. C. 244.

sense a new manufacture; but the Court was not impressed with the ingenuity of the new combination and decided accordingly against the patentee. The Court was quite unable to express the objection, and the judgment of Cotton, L.J., stands in these words:—

“ Although this is a new machine—that is to say, a machine in the sense that it has never been seen in its actual form by the public at the time when the Plaintiff produced it—it is not new in the sense of being a substantial exercise of invention. Therefore, in my opinion, it is not proper subject matter of a patent. It is difficult to express in words with preciseness what is meant by ingenuity and what is meant by invention; but I express my opinion that in order to maintain a patent there must be a substantial exercise of the inventive power or inventive faculty. Sometimes very slight alterations will produce very important results, and there may be in those very slight alterations very great ingenuity exercised and shown to be exercised by the patentee. That is my opinion.” (7 R. P. C. 66.)

In contrast with this decision, in which a mere scruple in the mind of the Court as to there being sufficient inventive ingenuity was held fatal to the grant, take the recent judgment in the *British Vacuum Cleaner Co. Ltd. v. Suction Cleaners Limited*, where the question of subject matter is disposed of upon the following principle.

“ If it had not required invention of a sort, it might well be said that the world would long before have discovered what it then found that it wanted so much. Looked at from that point of view, I think the Court ought to regard the specification, when it does result in so useful a production, with as favourable an eye as is consistent with fairness.” (21 R. P. C. 312.)

Here, then, we have two sharply-contrasted rules, to either of which the tribunal may resort. A mere scruple as to the ingenuity of the invention patented will warrant a Court in deciding against a patentee, while on the other hand a favourable disposition towards the patentee of a practically useful machine will warrant the Court in putting scruples aside and regarding the patentee's claim “with as favourable an eye as is consistent with fairness.”

Again, the Courts have been no less arbitrary when they have attempted to define inventive ingenuity than when they have evaded the task of definition. Workshop ingenuity is sometimes instanced, by way of contrast, with true inventive

ingenuity; but no man can draw the line between the two kinds. An idle apprentice, tired of manipulating the steam cock of the engine that he had in charge, tied a string to it, and fastened the other end of the string to a moving part of the engine, so that it would automatically control the admission of its own steam, and all unwittingly he invented the slide valve. Does that rise above the level of workshop invention? But who can doubt that the slide valve, when newly invented, was good subject matter. Clearly the kind of invention involved is essentially an irrelevant consideration. The steam engine with automatic control was a "new manufacture," and the projector who first saw and made known its possibilities was clearly entitled, in a moral sense, to his patent rights in consideration of his service rendered to the public, let the academic questions concerning the degree and quality of his inventive ingenuity be settled how they may. The same point appears even more clearly from a story that is told of Arkwright and one of his workmen. Whether the story be true or not is immaterial, for even as a mere hypothesis it illustrates the law. The story is that one of Arkwright's workmen hit upon the expedient of chalking his yarn for the purpose of lubricating it. This was eminently a case of workshop ingenuity, for the workman, far from projecting any new invention on the footing of his contrivance, kept it secret for his personal advantage, and when spies had discovered his artifice he was well content to be compensated by his master with a *solatium* of a few shillings a week. Had the matter rested with the nameless workman, the invention would have eased the burden of the daily task for one worthy weaver during a few toilsome years and have died with him, to be lost to society until rediscovered by some second "true and first" inventor. But in Arkwright's mind the idea developed into a project of new manufacture, of which project Arkwright was the real, and undeniably the real inventor.



Judicial pedantry, if it did not despise the contrivance as wanting in the necessary inventive ingenuity, would at least deny that ingenuity to Arkwright, who only saw the *merit* of the expedient when the *expedient itself* was shown to him by someone else. And had a projector in such circumstances obtained a patent for what was only in this large sense his own invention, his claim would undoubtedly at the present day be set aside by our English Courts. It is not here proposed to argue with those, if any such there are, who imagine that this fact can be posted to the credit of our English jurisprudence, or who rate the enterprise and intelligence of a discerning projector below the lucky shots or barren lucubrations of the mere dreamer. The inventor whom for its own sake the community should seek to encourage, is the inventor of a sound project of new manufacture, and the merit of the Patent law may be appraised by considering to what extent it fosters that class of invention.

Tried by this test, the vague doctrine of subject matter which at present passes current in our Courts is as bad as it possibly can be. The blackmailer who hopes to prey upon the apprehensions of enterprising manufacturers, finds his account in the complexity and uncertainty of the law. He knows that however impudent his claim, nobody can venture to advise with confidence until it has been tested by an action that it will not be allowed.

"Every person of common sense knows," said Lord Bowen, in *Skinner v. Shew*, "what is involved in patent actions, and what the expense of them is, and everybody knows that to be threatened with a patent action is about as disagreeable a thing as can happen to a man in business, and is the thing most calculated to paralyse a man in his business, even if he be innocent of any infringement of patent law."<sup>1</sup>

With such a lever at command the pseudo-inventor is indeed a formidable danger to the industrial community, which cannot possibly tell whether the Court will see

<sup>1</sup> (L. R. [1893], 1 Ch. 424.)

inventive ingenuity in the most obvious modification of existing appliances or deny it to the boldest flights of the projectors' imagination.

Here then is a crying demand for reform, and the nature of the reform is manifestly plain. We want to be rid of all the mass of unmeaning refinement which has grown up as gloss upon the word "invention," and to come back to the simplicity of the Book of Bounty and the Statute of Monopolies, which make a "new manufacture" the test of novelty, and a "project of new invention" the subject matter of the grant.

There is a slightly different point of view from which this reform appears equally imperative. Among the depredators who prey upon British industry, the most formidable by far is the alien holder of a British patent, who holds it for the sole purpose of obtaining protection in the British market for a foreign manufacture. Down to the present time the German dye-stuff manufacturers have been the most formidable assailants of British industry by this method. The audacity of their attack is incredible: its success is proportional to its audacity. The procedure is indeed simple in the extreme. Some German manufacturing house applies for and obtains a British patent for an invention, which may be the invention of the applicant or of some one else; since, in the confusion of our Courts as to the meaning of "inventor," it has come about that they apply one rule to applications coming from persons resident within the realm, and another to such applications when they come from abroad. The native applicant must be himself the originator of the invention; if he has received it by communication from another person within the realm he is incapable of receiving the grant. But the foreigner resident abroad, may get his idea exactly as he pleases; so long as he is the first projector, he, according to the old rule, is the true and first inventor. It thus happens that in certain circumstances

the only way in which a British subject can get a valid patent is to betake himself abroad, and presenting himself to the Patent Office in the character of an *alien ami*, to claim the privilege of a foreigner.

But to return to our German friends. Having obtained their patent on these easy terms, they proceed by its means to oppress and penalise the British manufacturer. The whole story is succinctly told in a judgment recently delivered in the case of the *Badische Anilin und Soda Fabrik v. Thompson*.<sup>1</sup> The learned judge said:—

“The case raised by the defence is of a most unusual character. Each patent is admitted to be useful; it is admitted that the invention is properly described in the specification; it is admitted that there is no anticipation. Therefore, so far as the ordinary grounds upon which the question of validity or invalidity is discussed in this Court, it is admitted that the patents are valid. But the Defendants raise this defence, which I will state shortly without reading the particulars of objections. They say the patentee never intended to manufacture, and does not manufacture, the dye-stuffs in this country, and makes use of his patents to prevent other persons from doing so, and they say further that he makes use of the privilege granted to him by the patents—to put it shortly—by selling the dye-stuff at an exorbitant and unreasonable price, and to the serious disadvantage of our people, as compared with the people in certain other countries in which the dye-stuff is sold at a lower price.

“So far as the facts are concerned, I have this. The Plaintiffs have never manufactured in England. The ground which they put forward as a reason for their not having manufactured in England is that alcohol forms an important element in the manufacture of this product, and that the excise laws in England impose such a duty upon alcohol as that the manufacture cannot be carried on at a profit in this country. Whether their reason be a good or a bad one does not really concern me, but at all events, it is not an unreasonable one, and it commends itself as having some reasonableness behind it. I think I must infer, also, that from the first they never intended to manufacture in this country. I have it also proved that the dye-stuffs are sold in this country at a price considerably higher than that at which they are sold in certain other countries, and in particular I will take Switzerland as an example. But it happens that in Switzerland and, as I gather, in all other countries in which these dye-stuffs are sold at a price considerably under that at which they are sold in this country there is no patent protection for chemical products, and so the Plaintiffs have to suffer from competition, and the consequence of that is that they are compelled in those countries where they have competition to sell at a lower price. So also in certain countries where they have protection they are exposed to more or less infringement, and according as the infringement is more or less so again

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<sup>1</sup> 21 R. P. C., 478.

in those countries they are driven to make their prices lower or higher. Certain examples were given at a period some years ago, when the stuff in this country was sold at 30s. and the infringing material was sold at 15s. I am asked to infer from a comparison of these prices that the price charged by the Plaintiff Company was such an exorbitant and unreasonable price that on that ground alone the patent ought to be declared void or revoked. I cannot on these facts come to any such conclusion. There may have been various circumstances affecting the manufacture of the patented article which determined the price, and it is impossible for me on the facts, therefore, to come to the conclusion that the prices at which they have sold are so exorbitant and unreasonable as on that ground, assuming that the case of *The King v. Eyre*—and I only assume it for the moment—is a general authority for the invalidity of a patent where the patentee makes use of it by charging an exorbitant and unreasonable price—assuming that to be an authority in the present case, I cannot on the facts come to the conclusion that the present case falls within that authority.

“Am I to refuse to give the Plaintiffs relief on the other ground, which is the ground mainly put forward . . . . namely, that the patentee did not intend to manufacture and does not manufacture the articles in this country? It is put in this way. It is said that *prima facie* all monopolies are bad in law, that at the Common law a monopoly was good if it was for the introduction of a new manufacture into this country by which employment was increased and the general prosperity of the country was contributed to.”

The learned judge then proceeded to discuss the authorities for this contention, and arrived at the conclusion that such a condition is not essential to the validity of the patent which he accordingly upheld.

Now, strange as this doctrine is, it cannot be doubted that the great majority of English judges would follow and adopt that judgment to-morrow if in another case the same state of facts were proved. The German manufacturer would indeed be a poor creature if, with such encouragement, he refrained from plundering Lancashire, and it suggests some doubt concerning the American character for smartness that “Cousin Jonathan” has not yet joined in the work of spoliation on any large scale. That he will take his share in future goes without saying.

What, then, is the remedy for this great mischief? Clearly it is to be found in a recurrence to the sane rule that patents can only be granted for the fostering of new manufactures, and that, if misused to the hurt of trade,

or raising of the prices of commodities at home or general inconvenience, they fall. This is no innovation. It is the very tenor of the statute at this hour, but the Courts by their glosses have in effect repealed the statute. It is the condition of every patent grant, but the way in which that condition is enforced appears by the passage above cited from the judgment in *Badische v. Thompson*. Either a great reforming judge with sufficient authority to repair the waste of thirty years of judicial backsliding, or an Act of Parliament, is necessary to give present validity to the Statute of Monopolies, and, great as is the difficulty of forcing any useful legislation through Parliament, there seems a better present chance of a remedy from an Act than from a reformer.

The doctrinal change thus rapidly reviewed has been long in progress, and of very slow development in comparison with certain changes of procedure which have occurred within the last thirty years, and have entirely remodelled our judicial administration. Chief among these changes are the gradual ousting of the jury and the wide extension of the remedy by injunction. A few words may be bestowed upon each of these topics in their relation to the Patent law.

And first of the substitution of justices for juries as judges of fact. To a certain extent this may be regarded as an inevitable change. The old-fashioned trial by jury is strangely unsuitable for the investigation of complicated issues such as commonly arise in patent actions. Huddled together in a jury box, with no convenience for taking notes, and no opportunity of asking questions, even twelve Fellows of the Royal Society could not be expected to follow with success the evidence given by scientific witnesses over a period of three or four days in reference to matters with which they might be personally unfamiliar. Imagine, for instance, a jury of physicians engaged under

such conditions in trying a patent for the three-wire system of electrical distribution. The thing is palpably absurd, and the absurdity is in no way diminished if we assume that instead of physicians, who know the wrong science, we have a jury of tradesmen who know no science at all. An attempt—but a very ill-considered one—was made to remedy this anomaly by the Act of 1883. Sect. 28 of that Act provides that :

“In an action or proceeding for infringement or revocation of a patent, the Court may, if it thinks fit, and shall, on the request of either of the parties to the proceeding, call in the aid of an assessor specially qualified, and try and hear the case wholly or partially with his assistance.”

Although in two or three instances such an assessor has assisted at the trial of an action, the section has been practically inoperative, and that is but little wonder. The presence of the assessor places everybody in a false position. The communications which pass between him and the judge are private, and while they are supposed to influence the judge, they do not, like the verdict of a jury, exonerate him. The judge is still responsible for deciding upon both fact and law, and if the assessor contradicts a witness, the judge must decide between them without the opportunity of testing the controversy by cross-examination. The presence of this expert person, whose evidence is imparted to the judge in whispered confidences, who cannot be examined or cross-examined, who acts under no responsibility, who gives no verdict and leaves no trace upon the record of the proceedings, is a thing so strange and anomalous, that it is easy to understand that no lawyer ever wishes to try a case with such assistance.

But if the expert assessor is an anomaly, it still does not follow that the only or the best alternative is a judge without a jury to try the issues of fact. This arrangement also has great inconveniences. Apart altogether from the fact that the judge, as a rule, is by no means an expert

person in matters scientific—itself a matter for consideration—there is the still more serious disadvantage that it leads to immature decisions upon an imperfect view of the evidence. Few judges have the patience to listen to a summing up of the evidence which has just been given in their hearing. Certain passages have produced a strong impression on their minds, and this strong impression they mistake for familiarity with the whole. For the most part they resent any attempt by counsel to digest and summarise the evidence as if it involved a personal slight. The only argument to which they will listen, speaking generally, is an argument addressed to their own expert opinion. And as modern practice requires them to make a rule of delivering judgment off-hand, the decision in the Court of First Instance is commonly the improvised opinion of a more or less clever man, after a few hours' study, upon a group of scientific questions with which he has no general familiarity. For a real trial by witnesses it is necessary to go to the Court of Appeal, when, with the aid of a printed shorthand note, the advocates on one side and another get an opportunity of marshalling their evidence and discussing it. A process from which this necessary operation is wanting cannot be a satisfactory mode of trial, for judges are but men and no more capable than juries of justly weighing and successfully utilising an undigested mass of conflicting evidence.

Here clearly is another demand for the reformer's activity. A mere recurrence to the old-fashioned special jury affords no remedy at all, and the particular remedy devised in 1883 is worse than useless. Perhaps a proposal of which something was heard in 1903 at the Liverpool meeting of the Incorporated Law Society is worth consideration in this connexion. Dealing with the difficulty now under discussion, as it arises both in patent actions and others in which the issues involve questions of technology, Mr. Ernest Garle

advocated the introduction of an expert jury. Pledging only my recollection of his proposal as embodied in his paper, which I read at the time, I may summarise his scheme in this way. The panel of the expert jury would be made up from the membership of the great professional societies, such as the Institutions of Civil, Mechanical and Electrical Engineers, the Society of Chemical Industry, and others of that sort. Five jurors would constitute an expert jury, of whom three at fewest would be drawn from crafts not directly connected with the industry concerned in the litigation. Persons directly interested would, of course, be ineligible for the expert, as for the common jury.

It is evident that a tribunal so constituted would not be obnoxious to the foregoing criticisms, and as it is the present object rather to suggest matter for discussion than to arrive at a definite conclusion, it may suffice to leave Mr. Garle's suggestion at this point and to pass to the next and still more important subject of the remedy by injunction.

An injunction is a device for changing a tort into a crime, and is singularly out of harmony with the mild and reasonable spirit of the Common law. But from the earliest times it has constituted a part, and an indispensable part, of the machinery of Government within this realm. At one period indeed, the period of the Tudors and the Stuarts, when despotic theories of government were in vogue and for a time ecclesiastics and civilians prevailed against the exponents of the Common law, injunctions played a large part in the administration of justice. But with the return of Constitutional Government in the seventeenth century, the Common law procedure was restored, and the injunction relegated to its ancient rank of an extraordinary remedy reserved for extraordinary occasions for which the Common law failed to provide adequate relief.

The great vice of the injunction, considered as an ordinary remedy, is that it preserves no proportion between the



grievance and the relief, so that the remedy may be, and often is, much worse than the disease. This is very strikingly illustrated by the case of *Badische Anilin Fabrik v. Levinstein* (24 Ch. D. 156). That was an action on one of those obstructive patents already referred to, which are taken out by a German manufacturer for the purpose of preventing the introduction of a manufacture into this country. The subject matter of the patent was a dye-stuff of no commercial value, the colour obtained by the patented process being one for which there was no demand. The patent rights, therefore, were of no pecuniary value to the patentee, except in so far as they might be made use of to block the path of other inventors who might be more fortunate in hitting upon useful shades of colour. The defendant, Levinstein, was such an inventor, who working upon parallel lines invented another dye-stuff of a different hue and of very great commercial importance. Levinstein was a manufacturer, in Manchester, of dyes, and a rival of the German house. The Germans accordingly brought their action and shaped their case upon the theory that in the course of carrying out his different process, Levinstein incidentally made use of theirs. They alleged, and proved to the satisfaction of the judge, that their material existed, not indeed as dye-stuff but as re-agent, at a certain stage of Levinstein's operations. They accordingly asked for an injunction to restrain the use of a process which, admittedly, they had not invented, because it incidentally involved the employment for one purpose of a re-agent which they had invented for another purpose. The injunction was granted, with the following comment by a judge, who considered that he had no choice but was bound to inflict a hardship:—

“I cannot come to this conclusion, I must honestly say, without some regret. I think Mr. Levinstein has employed great knowledge, great skill and great perseverance in finding out these processes, but I am sorry to say that the law compels me to inform him that these processes cannot be used in the production of this colouring matter, seeing that the production of this colouring matter is protected by a patent.”

So much for the philosophy of this injunction—now to consider its practical effect. Levinstein being prevented from working his own invention in Manchester, was driven to arrange with the Badische Company for the manufacture by them of his dye-stuff in Germany. That Company, as the only manufacturers of this material, fixed the price of it in this country at their own discretion. But as the dyeing industry is largely carried on in Holland, and as no patent protected the manufacture in that country, they were driven to sell it there at a competitive price. The upshot was that the Manchester manufacturers sent their goods to Holland to be dyed, and a large industry was strangled in this country and fostered in Holland by this most mischievous injunction. Now let us sum up the whole situation, and see if in sober truth the remedy here was not much worse than the disease. The wrong complained of is infringement of a patent right of absolutely no pecuniary value to its owner. It never had yielded, and it never could yield, except in the way of blackmail, a penny piece to the grantees. Yet to protect this worthless property an injunction issues, making it a crime punishable by imprisonment during the pleasure of a judge, for a Manchester man to carry out his own invention. Manchester manufacturers are forbidden to send goods to be dyed by their own townsman, and driven to send them instead to Holland, there to be dyed with colours made in Baden. It sounds like a story from *Alice in Wonderland*; it is the simple truth concerning what results from arming judges with the power to issue injunctions broadcast “whenever just and convenient.” •

Lest it should be thought that I am animated in this criticism by any theoretical objection to arbitrary forms of Government, let me cite in support of my present contention, that injunction as an ordinary remedy is liable to great abuse, the solemn protest uttered by one of the

greatest of modern judges in the case of *Adair v. Young* (12 Ch. D. 20). I transcribe the whole passage precisely as it stands in the law reports:—

“James, L.J. As my learned Brothers are agreed it is immaterial that I cannot come to the same conclusion. I think that an injunction ought not to be granted against a man unless he has done something which he ought not to have done, or permitted something which he ought to have prevented. Now, a master who comes on board ought not to be answerable on the ground that when he takes the command, there is on board a pump which infringes a patent. He does not, owing to his qualified possession, become at once an infringer. He had no power to take a pump out of the ship, he had nothing to do with putting it there, and he was not wrong in allowing it to remain there, for he could not lawfully remove it. An injunction therefore can only be granted on the principle of *quia timet*, and in applying that principle I think it would be a right exercise of the discretion of the Court not to grant an injunction against a master who has done nothing wrong, when there is no difficulty in finding and suing the owner of the ship. I certainly should not have granted an injunction against him in this case, and in my judgment the injunction ought to be discharged.”

May 19. James, L.J. “I desire to add a few words to what I said on Saturday (May 17) in the case of *Adair v. Young*.

“In the absence of the owners it appears to me that the Court could not make a mandatory injunction as to the equipment of the ship. And that being so, I cannot concur in granting an injunction to restrain the master from doing what it appears to me to be his plain duty to do. Whatever appliances there may happen to be on board, however they came there, pumps, anchors, fire-extinguishers, stolen or not stolen, pirated or not pirated, it is his bounden duty to use them according to the exigencies of navigation for the safety of ship, cargo, and life. To the master when out at sea (injunction or no injunction) *salus navis est suprema lex*. And for myself, I believe that a master would be practically as safe in disobeying an injunction under a pressing emergency as he would be in shooting a mutineer. And in my opinion, if a single life was lost through the master's neglect to use such appliances, the injunction would be no defence to an indictment for manslaughter.”

Even the extensive mischief done by the injunction granted in the *Levinstein* case hardly illustrates so impressively as this remarkable judicial protest, the reckless use which our Courts actually make of their power of granting injunctions.

But to realise to the full how mischievous is this procedure by injunction, it is necessary to follow it through to the next step—the motion to commit for a breach of the injunction. When such a motion comes on in the King's Bench Division

the procedure of our Courts is seen at its very worst, and that worst is bad indeed. The injunction itself is always drawn up in the loosest possible language—that has come to be common form. It gives the defendant no precise information as to what he is enjoined not to do, and consequently the main question on such a motion usually, is what is the subject matter of the patent, and does the defendant's action amount to an infringement? Such a question in an infringement action is considered with all the assistance that oral evidence, tested by cross-examination and deliberate argument, can afford. In chambers it is dealt with in a scrambling discussion by the light of affidavits as a mere interlocutory proceeding. Justice under such conditions is impossible, and even mercy is not always to be expected. The following account of what happened a few years ago, which, although it has never yet been published, I have on good authority, will serve to show how unworthy of the reputation of British justice such proceedings may be.

A poor tradesman had been attacked by a great corporation for infringing a chemical patent by the sale of pirated goods. In the action an interim injunction was granted. He was charged with a breach of the injunction by the subsequent sale of other goods, and the motion fell to be heard by a learned judge—well-known at that time for the facility with which he made orders of commitment—who no longer adorns the Bench. It appeared that the defendant's wife had assisted the defendant in his business in connection with the transaction. Almost as a matter of course husband and wife were promptly committed. The wife, poor woman, made a scene in the judge's chambers. She fell upon her knees and begged not to be taken away from her infant child. "Oh no," said the facetious judge, "they can accommodate the child in Holloway," and he ordered man, woman and child, all

three, to prison. Let it be added that the order was discharged subsequently by the Court of Appeal. It is not sufficient to show that such a wrong as that is not incapable of being remedied. The most imperfect system of jurisprudence in the world would afford a remedy in such a case. It ought in this country to be—not remediable but—impossible.

What, then, is the nature of the reform which this mischief demands? No more, probably, than this: that the injunction should be relegated to its old and constitutional rank of an extraordinary remedy, to be applied only when the Common law remedy by damages is shown to be inadequate. Damages are proportioned to the injury inflicted, and cannot therefore give rise to the grievous inconvenience to which the administration of justice by injunctions tends. It may indeed be admitted that there are cases—as for example, cases of pertinacious and irresponsible infringement—which cannot be effectively dealt with without the power of granting an injunction. But these are the extraordinary cases which call for an extraordinary remedy, just as a choking fit may call for tracheotomy. The surgeon who practised tracheotomy for the relief of uncomplicated sore throat would not long retain the confidence of his patients, and it is only a superabundant lack of criticism which secures the reverence of the public for those administrators of the law who, by the indiscriminating issue of injunctions, retard the expansion of British industry in order to enrich patentees.

J. W. GORDON.

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#### IV.—NEUTRAL TRADE IN CONTRABAND OF WAR.<sup>1</sup>

I N inviting me to read at this important gathering of legal experts a paper on the complex subject of contraband of war, the International Law Association has done me an honour of which I am very sensible. Of the responsibility which my acceptance of the invitation imposes upon me I am also fully conscious. I trust you will not think that in accepting the honour I am seeking to evade the responsibility, if I say at once that I am going neither to call in question the right of belligerents to seize and condemn, nor the right of neutrals to trade in, contraband of war. Those difficult subjects, Pre-emption and Continuous Voyages, are equally outside the scope of my paper. The atmosphere of international controversy is, indeed, already so thick with the dust raised by many and valuable treatises on these various aspects of the subject that I feel that, for myself, I can attempt no useful addition to their discussion. Instead, I propose to invite your attention to a phase of the subject which, in my opinion, is of the highest importance, but which, owing to the greater prominence of the other aspects, has hitherto certainly not received the attention which it deserves. I am hopeful, indeed, that by considering the subject from the point of view which I am about to place before you, a way may be found for removing or modifying in some essential points the present conflict between belligerent and neutral rights. •

Recent experiences have made it plain that, be the rights of belligerents what they may, neutrals regard it as intolerable that neutral mail and passenger steamers should be seized or interfered with on the mere suspicion of carrying

<sup>1</sup> A Paper read at Christiania on September 5th, 1905, at a Conference of the International Law Association.

contraband of war. Further, it is a bitter ground of complaint on the part of neutrals that their ships carrying coal or foodstuffs to a neutral destination are liable to seizure on the erroneous suspicion of carrying supplies to the adversary. It will be fresh in the memory of all how great was the outcry in Germany at the British seizure of German mail steamers in the Boer War, and more recently in England, early in the present lamentable hostilities, at the Russian interference with British mail steamers.

The main object of this paper is to insist on the fact that the neutral sufferings to which I am referring are brought upon neutrals mainly by their own fault—by their failure to take any concerted action to prevent the shipment or carriage of contraband of war on mail and passenger steamers, and also by their failure to provide any means by which the genuine neutrality of cargoes of coal or foodstuffs can be recognised or identified by belligerent cruisers. The case of the mail and passenger steamers is, of course, the more important. What I want to demonstrate is the fact that the neutral States at present allow a mere handful of traffickers in unlawful merchandise to jeopardise and prejudice the whole vast body of innocent traders. You may object that I have no right to describe as unlawful a trade which the law permits. The trade is, however, unlawful, at all events in these two senses—that the objectionable goods may be lawfully seized by the adverse belligerent; and that—I take the case of my own country—the Royal Proclamation of Neutrality forbids the carriage of contraband of war under pain of “his Majesty’s high displeasure.” The Royal Proclamation describes the carriage of any articles deemed contraband of war as contrary to the duty of the subjects of a neutral Power. You may further object that the national subjects whose legitimate trade it is to manufacture and export warlike stores ought to be at liberty to continue to carry on their trade, at their own risk, even

if another State goes to war with the nation which they are in the habit of supplying. I agree. I agree that such traders should be allowed to carry on their ordinary business—at *their own risk*. My point is that it is illogical, immoral, and unfair that the general body of traders should, whether they like it or not, be forced to share this risk. If, in order to earn their living and to support the workpeople in their employ, the contraband traders find it necessary both to run the risk of capture, and to set at naught the Proclamation of their Sovereign, then, I say, let them do this solely at their own risk, and not involve in it the innocent and the law-abiding. If you demand by what way the innocent and the law-abiding are prejudiced and involved, I can but invite your attention to facts familiar to all the world.

Why did the British warships seize, in the Boer War, the German steamers *Bundesrath*, *Herzog*, and *General*, mail boats carrying miscellaneous cargoes? Why did the Russians seize the P. and O. steamers *Malacca* and *Formosa*, and the German steamer *Scandia*? Everybody knows the reason for these seizures. It was believed that amongst the cargo there was hidden contraband of war. And everybody knows, also, that if reasonably holding such a belief the captors had, in their own protection, the right to seize. But as in each case the vessels were ultimately released without discovery of contraband, we must assume the admission that there were, in fact, no such goods on board. We may further accept it that in each instance the ship's manifest contained particulars of innocent cargo only, and that the captain indignantly denied that any goods of a different nature were in the ship. But the evidence of the manifest was not regarded as conclusive, and the captain was not necessarily to be believed. Moreover, he might have been deceived; and fuses, bayonets, or cartridges might have been fraudulently shipped and described as agricultural



implements and nails and hinges. And it is only because of this possibility of dishonest connivance on the part of the captain and owners, and more especially of fraudulent shipment in spite of them, that costly mail steamers, with scores or hundreds of sacks of mails, numerous passengers, and cargoes worth any figure between £100,000 and £1,000,000; only, I say, on account of the possibility of dishonesty or deceit that the ship and her freight may be delayed for days or even weeks when every half-hour of detention is a serious loss for all concerned.

Let us see how such a remarkable state of affairs can have come about. It is necessary to go back some centuries, to the days when the term "contraband" was first employed. In those days the conditions of ocean carriage differed widely from those of the present time. To-day, merchants who carry their own goods in their own ships are very few; the merchant pays a shipowner to carry his goods for him. The trade of the merchant and the business of shipowning, though mutually dependent one upon the other, are occupations now quite distinct. Formerly this was not the case. The general rule was that the merchant and the shipowner were one and the same. The supply of warlike stores to a belligerent was a lucrative business, and the merchants who carried on a general trade would convey contraband with their other goods. It was, of course, a risky business, but the prospective profits were great, and the successful voyages would be expected to pay for occasional losses sustained by capture. If the merchant-shipowner's cargo would not fill the ship, he would fill up with goods from other merchants in need of carriage. Such merchants could ship what they liked and share the same risks as the merchant-shipowner. Merchants in need of transport for their goods could not pick and choose; they had to accept such ocean carriage as they could get, and be thankful. Their goods might be innocent, but if they were to be carried at all they would

have to take their chance of being stowed in the hold with contraband. It is reasonable to conclude that, in the early days referred to, contraband goods, if shipped at all, had of necessity to go with general cargo. It was a custom created by the force of circumstances. And when, later, ships were, one by one, built not for the carriage of the owner's goods, but to earn freight for carrying goods for all and sundry, the shipowner had to accept the custom as he found it. He might charge higher rates for carrying contraband goods, but if he could not fill his ship with innocent cargo he could not afford to sail with empty space. The shippers of innocent goods were quite alive to the position, and it was useless for them to raise objections. The force of custom is overwhelming, and probably it would never even occur to them to object. To-day, practically all the carrying is done by vessels built solely to earn freight. The competition amongst the carriers is very keen, and the ancient laws and the ancient customs as to shipment and carriage of contraband remain unchanged. The conditions themselves have entirely altered, but in the methods of trade and business it is easier to create new conditions than to make the smallest change in custom. In the physical world, the laws of nature, in their gradual operation, adapt structure or mode of life to conditions as they develop. In human ethics ancient usages are altered to accord with modern conditions only as the result of some moral convulsion so violent or some evidence of unfitness so convincing as to raise a clamour for reform. If you agree with my description—based, I admit, mainly on a sense of the probabilities—if you agree with my description of the circumstances originally governing the shipment of contraband, you must needs also agree with me that the conditions of ocean trade and carriage as they exist to-day have changed *in toto cælo*. In any case, you will recognise that there exist to-day conditions and factors of the highest

importance which in the early days of contraband were impossible and not imaginable.

Let us briefly compare the conditions and factors prevailing when contraband trade was in its infancy, and those at the present time in force. At the outset, colonies and foreign settlements were practically non-existent. The distant east, the distant south, and the distant west were outside the zone of trade. For the traders of the northern shores, even the Mediterranean was a distant voyage. When war occurred it was waged between European States in European waters. The ships belonged for the most part to those whose goods they carried. They were very small ships, and their cargoes belonged to only one or two or half-a-dozen merchants. The merchants or their confidential men travelled with the goods and traded in person. There was little occasion to write letters; for mails and mail-bags there was no need at all. Passenger traffic did not exist. These were the conditions in which arose the usages and rules of contraband trade. What are the conditions to-day? New worlds have sprung up for trade. While the once predominant European traffic is now carried on in comparatively small craft, huge floating warehouses, steam-driven, trade with lands in former days unknown, to ports and cities in former days unfounded. A single steamer of to-day could stow away a whole fleet of laden ships of ancient times. An endless stream of passengers passes from distant shore to shore. Fast vessels, costing a king's ransom of former days to build and to equip, are specially provided for passengers and mails and the more valuable cargoes: mighty vessels, which go back and forth, which swing from east to west, from west to east, with the regularity of a pendulum. Steamers carrying each the goods of owners counted by the hundred; carrying sacks and sacks of letters innumerable—letters of business, letters of family love, letters of friendly greeting from land to land. The conditions of ocean trade

and traffic differ to-day as greatly from those of former times as the mighty steam-driven, electrically-lighted steamer of modern times differs from the puny wooden sailing craft of bygone days. But so strangely constituted is the human race, that, while we press eagerly forward in material change, to ancient usages and habits, however inconsistent with the altered facts, we still continue closely to adhere. And so it is that, without one thought of the absurdity, we allow the ancient usages and rules of contraband trade to interfere with modern necessities and rights; we allow usages and rules for which the need and the occasion have long ceased to exist, to be a stumbling-block, an exasperation, and an offence to all the law-abiding world of shipowners, passengers, and traders, to all who have postal messages to receive or send.

I have mentioned the seizures of the German mail ships in the Boer War, detained for days whilst their cargoes were discharged and ransacked in search of contraband which was not there. I have mentioned the *Malacca*, the *Formosa*, and the *Scandia*, seized and detained with passengers on board. These, however, are illustrations of loss attributable merely to actual seizure. The losses caused solely by the fear of similar capture it is impossible to assess. At the outset of the present war vessels exposed to the like risk were afraid to sail, or, having sailed, were detained by their owners at ports of call. Legitimate trade was handicapped and interfered with. In former days, when the total of the world's trade was a mere flea-bite compared with what it is to-day, and manufacturers and their employes, land carriers and ocean carriers, were but few in number, such a condition of affairs was comparatively of small importance. To-day, the burden of marine insurance against the risk of capture falling on innocent and law-abiding shipowners and traders amounts to a vast sum. I live in the world of marine insurance, and I speak of that I know.

And why all this incubus on trade? Simply—at any rate to a very large extent—because of the ancient and now preposterous traditional usage which permits the shipment of contraband goods in mail and passenger steamers and in ocean liners. It matters nothing that the owners of these costly vessels, many of which are not insured, detest the risks to which contraband exposes them, and that they issue notices declining to receive such goods: it matters nothing that innocent shippers abhor the trade in contraband and would not knowingly be involved in it. All this counts for nought. If the contraband trader by disguising or misdescribing his goods can manage to secure their shipment on any steamer, he is within his rights: for is not ancient and traditional usage on his side? And indeed, if a shipowner, while loudly proclaiming his intention to carry only innocent goods, should secretly connive at the shipment of noxious articles, he also will be within his legal rights. The innocent shippers who have taken him at his word have no redress for losses imposed on them if a captor should find contraband on board. The shipper of contraband is at liberty to deceive the shipowners and make them share his risk; the conniving shipowner is at liberty to deceive innocent shippers as to the nature of the cargo to be carried; innocent shippers are at the mercy of dishonest and deceitful traders and of conniving shipowners, though as a rule the owners of ocean liners, far from conniving at such frauds are, like the innocent traders, themselves the unwilling victims. So at least it is believed. Why then, should the British warships have been content with the indignant asseverations of the captains of the *Bundesrath*, the *Herzog*, and the *General*, that no contraband was in their ships? Why should the Russian cruiser have accepted such assurances from the captains of the *Malacca*, *Formosa*, and the *Scandia*? Captains are not told everything by their owners, and still more may owners be themselves the

victims of deceit. At the time when the *Malacca* and *Formosa* were seized in the Red Sea, the Russians admitted that they were on the watch for a particular steamer belonging to a trading line well and honourably known in the Japanese and China trade. Now the steamers of this line, Liverpool-owned, are generally understood to be entirely uninsured, so that the owners had the strongest reasons for not carrying contraband, and, as a fact, they issued printed notices declining any such trade. It can hardly be doubted that the vessel watched for by the Russians, then, had no contraband on board. But no amount of good faith or good intentions on the part of her owners would prevent her capture. For there is, in the present state of International law no means by which ship-owners can send a ship to sea, be she subsidised mail steamer, passenger steamer, or regular trader, safe from the risk of seizure on suspicion of carrying contraband of war. I have mentioned the reason; that ancient tradition permits dishonest or deceitful traders to impose contraband goods on the owners against their knowledge and against their will, and that if a shipowner, for his own part, chooses to connive at the shipment of contraband, the shippers of innocent cargo by the same vessel have no redress. So long as conditions so antiquated and absurd remain in force, so long will mail and passenger steamers be rightly liable to capture. The mere fact of a steamer being one of the world's mail-carriers should suffice to secure her from any interference. Mail steamers should be regarded as public or Government vessels; the obligation resting, however, on Governments to absolutely prohibit and prevent any use of them as carriers of contraband of war. If mail and passenger steamers are ever to be deemed, as the claims of civilisation and humanity demand, immune from capture, the conditions which at present justify their capture must be annulled. It has been my object, in the foregoing remarks, to emphasise this fact.

I will now proceed to indicate in what manner the immunity so loudly called for can be brought about. I will sketch the measures which could be adopted in Great Britain, and leave it to others to consider how far such measures might or might not be practicable in other States:—

(1) In the first place the Royal Proclamation should, in the case of mail and passenger steamers, be regarded as something more than a pious wish. It should be given the force of a legal prohibition, with punitive enactments.

(2) Owners knowingly carrying contraband goods, and traders shipping contraband goods, by such vessels, should be rigorously dealt with; the punishment for fraudulent misdescription of contraband goods being treated as a grave offence.

(5) Shipowners put to loss or expense through the illegal shipment of contraband, or cargo-owners similarly damnified by the illegal carriage of contraband, to have the right to claim compensation from the wrong-doers.

(4) Contraband goods illegally shipped or intended to be shipped to be subject to confiscation.

(5) The penalties for breach of the (suggested) law to be enforceable notwithstanding the successful delivery of the contraband goods.

(6) Persons giving information of breach or intended breach of the law to be rewarded by a proportion of the value of the confiscated goods, or otherwise.

(7) Insurances in contravention of the law to be null and void, with penalties upon the underwriters knowingly effecting such insurances.

(8) Shipowners under Government subsidy for the carriage of mails or licence for the conveyance of passengers to give pecuniary guarantees for observance of the (suggested) special laws against carriage of contraband.

I submit that there would be nothing unreasonable or impracticable in such laws, and that few, if any, British subjects would dare to attempt their breach or evasion. Contraband traders would, instead, make use of ships to which the laws did not apply. The shipment and carriage of contraband by mail and passenger steamers from Great Britain would cease, and with such cessation would disappear any reason for their capture. It may be objected that the British law would not prevent the shipment of disguised contraband by British liners loading cargo at Continental ports. I admit it; but if the regulations which I have sketched were adopted by all the States: if they were, in fact or effect, made international, the mail and passenger steamers of every nation would be closed to the trade in contraband. The offence would be equally preventable and punishable, whether committed by a foreign merchant against a British ship, or conversely by a British merchant against a foreign ship. It is my firm belief that the effect of an International law on the lines indicated would operate with such success that before long there would be a universal demand for similar restrictions, in protection of neutral traders generally, in the case of recognised liners sailing with the regularity of mail and passenger steamers, but, by reason of their slower speed, not in the category of such special vessels.

In thus proposing laws and regulations prohibiting the shipment and carriage of contraband of war by mail or passenger steamers, I refer, of course, to goods which are admittedly of this class. I recognise that the goods which are only conditionally contraband—goods which are or are not contraband, according to their destination—present some difficulty. Also, I recognise that some goods may be shipped and carried in good faith that they are not contraband, whereas a belligerent may regard them as contraband. I admit this difficulty also, but it should



not be insuperable. It should be incumbent on belligerents to make their published list of contraband as complete as possible, and it should be open to them to supplement this list whenever needful. It should then be unlawful to ship or carry by a mail or passenger steamer goods so prohibited: such goods would have to find some other means of transport. Neutrals might quite possibly not agree that all the goods prescribed on the belligerent list should be regarded as contraband; but as a means of securing immunity to their mail and passenger steamers the list would have to be assented to solely for the purposes of the mail and passenger trade. On the one hand it would be illegal and a punishable offence to ship or carry any of such goods on a mail or passenger steamer; on the other, mail and passenger steamers, on proving their character, would, if visited by a belligerent cruiser, be entitled to release. But I submit further, that in the event of there appearing on the ship's manifest certain goods of a *quasi*-contraband character, it should be possible to provide a scheme under which the captain of the mail steamer, as a condition of release, should give a guarantee, in terms to be provided, that the said goods should be carried back to the port of shipment or landed at a neutral port to be agreed upon. If, however, the belligerent cruiser should elect, in a particular case, to take possession of the steamer for purposes of search, then International law should provide a scale of compensation in the event of the suspicions of the captors finding no justification. In the contrary event—in the event of the discovery of contraband fraudulently shipped or carried—then the culpable parties should be liable to heavy penalties, as well as to pay compensation to the innocent sufferers by their deceit.

I am well aware that the suspicion of carrying contraband is not the sole ground of belligerent interference with mail steamers: that such vessels are also liable to be

suspected of carrying an enemy's despatches or military persons. It is true that in former times, before the use of mail steamers, such conduct on the part of neutral vessels was regarded as a heinous offence. But the conditions of maritime relations and communications have now so utterly changed that what was formerly a highly obnoxious proceeding has practically lost importance. In former times the foreign or colonial possessions of the European States were dependencies relying for their defence on local forces, military and naval. Between such forces and the motherland direct communications were of the first importance. In fact, without the constant renewal of the officers abroad, and a constant exchange of despatches between colony and parent State, the colony would have had but little chance against the enemy. Therefore this enemy, rightly and reasonably enough, regarded it as a heinous offence on the part of neutral vessels either to carry despatches or to convey officers or troops between colony or settlement and parent State. But the old conditions have entirely changed. Soldiers are now conveyed in troopships, if conveyed at all, and their officers with them. In event of the necessity to send officers by themselves, a variety of routes, by land and sea, direct and indirect, is open to them. But as an individual, the "military person" on whom in former days so much depended or might depend, has lost his ancient importance. There is, however, no reason why, if thought necessary, it should not be expressly declared illegal, and a punishable offence, to carry such persons in mail and passenger steamers to a belligerent port; and belligerent cruisers might be empowered to seize any persons so carried contrary to law. But I submit that the offence is practically obsolete, the individual "military person" having on the one hand lost his relative importance, and on the other having such a choice of alternative routes that merely to render it impracticable for him to journey in one particular

way must be like stopping one hole in a sieve. And so also with the carriage of despatches. If it were determined to conceal a despatch in a modern mail steamer, this could be done so effectually that hardly any search would discover it. But why take the trouble to conceal it when so many ways and routes are ordinarily open to the sender? And are thousands or scores of thousands of postal packets to be opened on the chance of one of them, innocent in its outward appearance, containing a belligerent despatch? The mere statement of the proposition is, or should be, sufficient to demonstrate its absurdity. And yet only last year the German mail steamer *Prinz Heinrich*, bound to Japan, was stopped in the Red Sea by a Russian cruiser and her sacks of mails forcibly taken from her. And to what end? For despatches, too, have largely lost their ancient importance. The electric cable encircling the globe in all directions, passing through neutral territory here and along the mighty deeps of the ocean there, has relegated the despatch of former days to quite a secondary place. I submit, then, that the time has come when any interference with the correspondence, personal and business-like, of the civilised world should be, by common accord, regarded as an outrage on the rights of all mankind, to be prohibited accordingly. This, I submit, is the manner in which all civilised people view the matter, and fierce resentment is likely to result if further attempts be made to enforce, in this respect, an obsolete right equally illusory and out of harmony with modern conditions.

Before concluding, I have to call attention to another aspect of the right of capture, in which innocent neutral traders are unnecessarily exposed to grievous injury. I refer to cases in which vessels carrying, for example, full cargoes of coal or foodstuffs are liable to be seized as being engaged in contraband trade. Whether the cargoes should or should not be regarded as contraband is purely a matter

of destination. The destination may be really innocent and unobjectionable, but it is not reasonable that adverse belligerents should be expected to take this for granted. Vessels are well known to sail for fictitious destinations, and to carry papers elaborately designed to deceive. Consequently, belligerents may capture and detain vessels laden with coal or foodstuffs, to the grievous injury of parties who are in fact intending no fraud or deceit at all. This is another instance of the wrong done to legitimate and *bonâ fide* traders by the latitude allowed to those who carry on a trade in contraband: another glaring instance of the manner in which illegitimate traders reduce their own risk by stirring up a thick mud of suspicion in which the innocent cannot be distinguished from the guilty. And the remedy in this case, if the nations should only agree to adopt it—and sooner or later I believe it will certainly be adopted—the remedy should in most cases be both sure and simple. Take, for example, the case of coal. A vessel sails from Europe to a distant neutral port, carrying on her ordinary trade in circumstances which, if fully known, would render the voyage free from suspicion. But not far from the vessel's innocent neutral destination are belligerent ports, and the vessel, her papers disbelieved, is seized and carried in for adjudication by a prize court of her captors. All this happens to her because belligerents have no means of distinguishing between the innocent ship and that which is intending to commit a fraud upon them; and I say that it is a disgrace to modern civilisation and to modern commerce that this should be so. •

For the condition of affairs which I have depicted I suggest a remedy, of which the basis is a Government certificate of the vessel's intended port of discharge—a certificate of the *bonâ fides* of the voyage. It will naturally occur to you as an objection both that a certificate may be evaded by its holders, and that it will be possible for the

shippers and carriers of an obnoxious cargo—obnoxious by reason of its belligerent destination—to supply themselves with a forged certificate: that such a paper will be only an addition to the other false papers carried on the ship. The certificate which I contemplate, however, will be merely part of a system which in its entirety will operate effectually. I propose my own country as an illustration of the working of the system, which, however, should be universal. This would be the system:—

1. The shipowner, before receiving his certificate, would have to declare his voyage and give pecuniary security that it should be duly performed, and that the cargo would, on arrival, be discharged in the manner customary in the case of similar cargoes delivered at the port.

2. In order to obtain release of the security on completion of the voyage, he would have to give evidence that the cargo had been so discharged.

These provisions 1 and 2 would effectually prevent the evasion of a genuine certificate. To defeat the use of a forged certificate the system would be extended thus:—

3. In the event of a belligerent cruiser visiting a vessel carrying a certificate either genuine or fraudulent, but appearing to be genuine, the visiting vessel will allow the ship to proceed, after making an entry in the log, and would retain possession of the certificate for delivery to his—the belligerent—Government. In the event of the subsequent conduct of the ship being inconsistent with the certificate, then the facts would be reported by the belligerent Government to the authorities at the vessel's home port, and proceedings would then be taken against the British owners of the ship, and of the cargo, for the forgery.

I recognise that if a foreign ship sailed from a foreign port with a foreign cargo, and with false papers, including a false certificate, to make it appear that she had sailed from a British port, there would be a difficulty. The British

Government whose certificate had been forged by the owners of a foreign ship would not be in a position to proceed against the forgers. If, however, the forgery of a Government certificate were made an offence by International law, or by international treaty, no shipowner would expose himself to the consequences of such a forgery. As to the punishment, both the shipowner, the cargo-shipper, and the captain would be liable to fine or imprisonment, or both. In addition, the shipowner could be deprived of his freight, and the cargo-owner of his profit, by fine or confiscation. Or the ship or her value could be confiscated.

4. All insurances effected on ships or cargoes where a forged certificate was carried should be null and void, with punishment to underwriters knowingly effecting such insurances.

The certificate system could be made available also in the case of blockades, to protect from seizure vessels which, in the absence of a certificate, might be exposed to seizure, on suspicion of intending to proceed to a prohibited port.

You may say that the effect of laws such as I have proposed would add materially to the difficulties and risks of contraband traders, who derive from ancient tradition all the rights which they now exercise—or, as I would prefer to say, which they now abuse. This I at once admit. But the proposed laws would be in the interests of the legitimate traders, who vastly exceed in number the traffickers in contraband. And I ask why the interests of the ninety-and-nine just traders are to be sacrificed to the claims of the relatively insignificant law-evading minority? Let these carry on their dangerous trade at their own risk, and not shelter themselves behind innocent persons who are forced to be associated with the risk without any share of the profits. Let the contraband traders rely on the speed of their vessels, and on other means of evading capture; let them, in short, carry on their trade solely at their own risk, and leave mail

steamers out of it. And similarly, we should not put them in a position to imperil the interests of innocent persons carrying full cargoes of coal and foodstuffs to unobjectionable ports, by refusing on our part to afford to such innocent traders the means to satisfy belligerents of their good faith.

. Let me repeat that what I propose, as a first step in protection of innocent neutral trade and traders, is in principle—

(a) That in order to render mail and passenger steamers immune from belligerent suspicion and consequent seizure it shall be a punishable offence to ship or carry contraband goods by them; and

(b) That in order to protect the owners of ships and of full cargoes of coal or foodstuffs, bound to unobjectionable ports, from belligerent seizure on suspicion of being bound to objectionable ports, such innocent voyages shall be protected by a Government certificate; and

(c) That the protection indicated in (b) shall be available in the case of innocent ships and cargoes exposed to risk of belligerent seizure on suspicion of intended breach of blockade.

As regards the measures, already detailed, to be adopted in order to give effect to these proposals, I submit that they are both possible and practicable. I need not remind you how, in Great Britain, our Foreign Enlistment Act has stopped, under risk of heavy punishment, the supply and equipment of vessels intended for belligerent use, and has in like manner effectively put an end to other un-neutral proceedings which, until the passing of the Act, were as permissible as the trade in contraband.

From time to time, for one national purpose or another, Great Britain has passed laws in a sense similar to those I suggest for the protection of neutral traders. For example (I quote the instances with which I happen to be acquainted: doubtless others could be mentioned), in

1651, in our great Navigation Act, in order to secure to Great Britain a monopoly of the trade with her foreign plantations, vessels sailing to or from the plantations were required to give security to a large amount that they would observe the provisions of the Act; the loading of cargo on a vessel of which the owners had not given such security to involve forfeiture of the ship. The rules providing for the trade and for the filing of the security-bonds were carefully laid down. In 1793, British vessels carrying corn to France were seized, and only released on security being given that the cargoes would be carried elsewhere. In 1854, certain prohibited goods were allowed to be exported, on bonds being signed by the exporters undertaking that the goods should be landed at the destination declared, certificates of such landing to be ultimately produced. The Merchant Shipping (Dangerous Goods) Act of 1873 requires that the nature of dangerous goods shall be marked on the packages, and that the shipowner shall be notified of their intended shipment. Shippers to be liable to penalty for breach of this law, and to a much heavier penalty for falsely describing the goods: in either case the goods themselves to be subject to forfeiture. The Customs and Inland Revenue Act of 1879 provides machinery for preventing the shipment of warlike stores which it may be considered desirable to retain in the country—penalty for breach, forfeiture of the goods and a heavy fine payable by the offending shippers. The Explosives Act of 1883 empowers shipmasters to search for and to break open packages reasonably suspected of containing explosives, without liability for damages for breakages caused in the search, and to throw overboard the goods when discovered. The Merchant Shipping Act of 1894 forbids, under heavy penalties, the carriage of dangerous or objectionable goods on emigrant vessels. It would, moreover, appear that, even in matters of contraband, the British Government can in



case of need be strict; for early in the present war it was cabled from Vancouver that "by the orders of the British Government" the British mail steamers trading between that port and Japan had been forbidden to carry foodstuffs to the Japanese. But, broadly stated, I think it is evident that my proposals contemplate restraints or securities with which, in circumstances more or less analogous, the British legislation is already familiar.

As has been already observed, the rules or common understanding governing the neutral right to trade in contraband of war, and the belligerent right to prevent such trade, arose in conditions widely differing from those known to us to-day. Since the rules referred to gained acceptance, the mighty forces of evolution have been at work on the conditions originally existing. Ocean transport has entered on a new phase, in which the former things have passed away and been succeeded by conditions entirely different and new. If a state of maritime warfare had always been concurrent and coincident with ocean transport, it can hardly be doubted that the forces which altered the conditions of transport would also have altered the rules or laws affecting the carriage of contraband. But while the changes in ocean transport have followed a gradual and uninterrupted course of evolution, the long absence of maritime warfare of any general importance has left the laws of contraband carriage just as they were a century ago. The present war, affecting as it does a zone in which a great part of the trade of the whole world is focused, has been attended with far-reaching consequences.

As the result of the foregoing condition of affairs, the trading community of the neutral world has awoke to an aggrieved or even angry sense that the time has come for revising ancient rules which are a serious cause of offence to modern trade. From all sides there has arisen a clamour against belligerent interference with mail and passenger

steamers and with vessels genuinely bound to neutral ports. But so long as mail and passenger steamers may reasonably be suspected of conveying contraband, and so long as vessels laden with coal and foodstuffs for neutral ports may reasonably be suspected of a destination hostile or prohibited, belligerents are clearly within their rights in interfering with such vessels. The only logical way of removing the friction thus created between belligerents and neutrals is by international agreement. Namely, that neutrals shall effectually prohibit and prevent their mail and passenger steamers from carrying contraband, and, in the case of cargoes of coal and foodstuffs, shall grant certificates to the carriers which shall satisfy belligerent cruisers that the alleged neutral destination of the ship is strictly *bonâ fide*; machinery, at the same time, to be adopted which will frustrate any use of forged certificates. I have indicated the manner in which all this can be done. If, as regards the mail and passenger steamers, in rare and isolated cases the neutral laws should possibly be evaded, such a possibility should be disregarded. It should not be allowed to weigh against a scheme which, while benefiting belligerents, is more especially necessary in the protection of the whole world's neutral trade. When neutrals shall, with one accord, unite to forbid the abusive employment of their mail and passenger steamers as carriers of contraband of war, then—and not till then—will they have the right to demand that such vessels shall be exempt from belligerent interference.

Let me remind you that International law is by no means to be regarded as a law of the Medes and Persians, never to be altered. The history of International law is like the history of most laws, a history of evolution. Just as the rules of hostilities on land have been continually made more merciful and equitable, in gradual harmony with the growing recognition of the claims of humanity and civilisation,

so also have the rules of war at sea been step by step amended. First, it was the right of a belligerent, if strong enough, to prohibit trade with his adversary altogether, under pain of confiscation of both ship and cargo. Then this right was modified so as to apply only to the supply of warlike stores. As to the goods of the enemy, they were lawful prize wherever found. Since 1856 the neutral flag has been their full protection. I am aware that it is said by some that the permanence of the Declaration of Paris is not to be relied on. Let me remind these that the Declaration was observed in the Franco-Prussian war and in the Spanish-American war, and that it has stood the test of the present hostilities between Russia and Japan. If ever there was a war in which the new law might have been set at naught it was in that between practically the only two Powers not parties to the Declaration—America and Spain; but even this test it stood. Then, last of all, has come into use the new and honourable rule of Days of Grace, which exempts from capture the property of the enemy in his adversary's port when war breaks out, and which further exempts from capture his vessels then sailing to or from the adversary's ports. On their part, neutrals, under pressure of the world's opinion, no longer commit or permit certain acts to which formerly belligerents could not object. As, for example, neutral hospitality is now strictly limited in the case of belligerent warships, and refused altogether to their prizes. If these altered conditions cannot in every case be credited with the force of International law, they are on the high road to becoming so. As civilisation advances so does the public opinion of the world crystallise into International law. Whether the beneficent changes to which I have referred be due to the force of individual example, to the influence of treaty clauses, or to international conferences in the interests of civilisation and humanity, matters not. I have referred to them only to

meet the possible objection that the rules of maritime warfare are beyond our power to alter. But, on the facts, such an objection is flatly contradicted by recent history. The Declaration of Paris abolishing privateering and making neutral vessels sanctuaries for belligerent property was not merely a milestone on the road of advancement and reform; it was a veritable convulsion of the laws of Maritime law. Nor was it even the result of a conference of the nations. On the contrary, the nations, one by one, elected to sign an international agreement which appealed to the common sense of humanity and justice. Why, then, should it not be possible, by a conference of nations, meeting with a common desire to bring it about, to effect that mail and passenger steamers shall be controlled by rules, the observance of which will entitle them to be exempt from seizure; and that full cargoes of coal and foodstuffs genuinely bound to neutral ports shall be so documented as to establish their right to be free from molestation?

As to the necessity for such an agreement, surely it needs no argument. The only questions which arise are these, viz.: (1) Whether international regulations can be made which shall prevent the carriage of warlike stores by mail and passenger steamers, and the forgery and use of fraudulent certificates of destination; and (2) whether this can be done so effectually as to satisfy the just requirements of belligerents. I have myself no doubt that to both these important questions the reply should be affirmative.

That the proposals for which I have ventured to claim your consideration are entirely free from difficulties, I am far from contending. That they are not capable of more effective treatment than I have sketched for them, this also I by no means contend. What I do contend is, that the adoption of international laws in the general sense which I have indicated is imperatively needed and cannot be indefinitely deferred. And I add the reflection that, the adoption

and successful working of such initial laws would prove to be but a first step to their further extension in the interests of peaceful neutral traffic. It is, I believe, generally understood that at some early date an international conference will be held at the Hague, principally, if not entirely, to consider how best the rights of maritime belligerents can be reconciled with the claims of neutrals. Is it extravagant to hope that views in the same direction, expressed, however imperfectly, before a body of such weight as the International Law Association, may be deemed worthy of examination by the conference? In any case, I am grateful to the distinguished members of the Association for thus enabling me to place these views before them.

DOUGLAS OWEN.

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## V.—THE CONGRESS OF ADVOCATES AT LIÈGE, 1905.

THE forensic systems of the different States of the Continent differ from that of England in that the Bars are not national but local. A grouping together of these local bars has in recent years taken place in several States. For example, some thirty years ago the Bars of Germany formed a Federation. Some twenty years ago the Bars in Belgium took a like course. The notion of a Federation of Bars within a State led to the idea of the International Federation of the Bars of different States. This was the origin of the first Congress of Advocates which was held in Brussels in the year 1897, and consequently, the origin of the second Congress of Advocates which has just been held at Liège in this present year.

The first Congress had before it a proposition to the following effect: "*Création d'une organisation permanente et*

*internationale libre ou réglementée soit entre les Barreaux officiellement établis dans les différents pays soit entre les avocats individuellement."* After a long discussion in the event, the Congress contented itself with the modest decision to institute a permanent Committee, sitting at Brussels, charged with the preparation of the programme for the next International Congress of Advocates, by putting into form the ideas put forward in the discussions of the first Congress. The result of the labours of that Committee was the Order of the Day put before the Congress at Liège, during its sittings, which took place between September 30 and October 4 of the present year. It is proposed to deal with the subjects *seriatim* in the order in which they came before the Congress.

The first question was whether the profession of an advocate should be free or should be under administrative or legislative control. In other words, whether the advocate should be what we in England are accustomed to term an officer of the Court. In this regard Continental practice varies widely. In all of them there are, of course, State conditions, which regulate the ascertainment of the qualification and the professional recognition of the advocate; but in no two of them can it be said that the degree of control over the advocate in the actual practice of the profession is identical. For example, that degree of State control ranges from the high water-mark of Greece, where the advocates are, in fact, public officials nominated by the King, to the minor State control which obtains in France and Germany, and to the almost absolute freedom which characterises Sweden. In no one country is the freedom so complete as in England, where, by virtue of its long historical continuity, unregulated by any legislative rule (save only the very indirect provisions of the Statute of Edward I), the Bar enjoys a unique position. The partisans of more complete State control put forward suggestions involving

the exercise of functions of professional discipline by the State, the limitation of the number of advocates by the State, and the control by the State of the exercise and practice of the profession. Those who were in favour of the freedom of the advocate relied upon the necessity of freedom of the advocate from State control, for the preservation of the liberty of the subject and the freedom of municipal institutions. As a side issue, it was pointed out that in matters of International law it was of the first necessity, for the preservation of the liberties of minor States, that the advocate should be free, because in International law there is no legislation to declare and there are no judges to administer the law. In the result, the discussion was summed up by the President to the effect that the Congress was desirous of maintaining the freedom of the advocate, and was not in favour of restricting in any country the number of advocates practising within it. In the course of the discussion it was pointed out that in some countries the path to the actual practice of the profession of an advocate was a long and difficult one. For example, in Germany it is necessary to devote nine years to general education, to spend three years at a university, to pass an examination enabling the aspirant to act as *référéndaire* or petty judge, (or, as we should say, referee,) without emolument, and then, after a certain lapse of time, to pass a further examination, so as to enable him to be admitted to practice as an advocate by the Minister of Justice on the advice of the Court of Appeal.

The next subject which occupied the Congress was the discussion of the question, whether the pursuit of callings other than that of an advocate should disqualify for the exercise of the profession. Upon this a considerable diversity of practice exists as between Continental States. In Belgium the question is decided by the Decree of 1810 upon the exercise of the profession of an advocate and

the discipline of the Courts, which prohibits the advocate from engaging himself in business which would render him an accountable agent. The Bar of Paris places the strictest possible construction upon such an interdict, and in effect prohibits the exercise by an advocate of any calling which entails financial responsibility. Thus, a Parisian advocate may not be a director of a public company. In Italy, even further, the law forbids an advocate to exercise any other occupation, even private in its character. On the other hand, in other States, in Denmark and in Norway and in Spain, for example, there is no incompatibility in general recognised in the following of any other occupation contemporaneously with that of an advocate. In the result, the trend of the view of the Congress was declared by the President to be, that it was not possible in an international Congress to lay down a rule which would be acceptable to the Bars of the different States, other than the recognition of the necessity for an advocate to keep free from every occupation which might impair the dignity of the profession.

The third question was framed so as to raise the question of what in England is called the fusion of the two branches of the profession. Here the constitution of the legal profession in different States varies widely. In Germany the unity of the *avocat* is generally recognised, and is supported on the ground that (a) the direction of the suit remains in one hand; (b) the advocate is better informed regarding a case which he knows throughout and to its depth; and (c) there is a diminution of the cost of litigation if only a single person be employed to conduct the suit. In Norway and Denmark the same system obtains. In France and in Spain, on the other hand, there is a separation between the functions of the advocate and those of the *avoué*. It was stated as the opinion of the Congress that the question whether the conduct of litigation should be divided between



two branches of the legal profession must be settled according to the necessities of different countries and different localities.

A second head of the third part of the Order of the Day raised the question whether the advocates in any particular country should be divided into classes according to the tribunals before which they practised. This was not a question of the division of one Bar into sections, but the creation of different Bars to accord with different Courts of varying jurisdiction. It was on all hands agreed that in each country there should be one Bar, and that the member of that Bar should be at liberty to practise before any Court in that country.

The fourth question set forth in the Order of the Day raised the point whether an advocate should be admitted to plead in the Court of a foreign country. The Committee charged with the presentation to the Congress of the report upon the Order of the Day, expressed the following opinion—That an advocate ought to be admitted on special occasion to plead before a foreign Court, on the sole condition of being allowed by the Judge to act as advocate, and that this permission ought always to be granted when the foreign advocate could produce proof that he had been regularly clothed with the qualification of an advocate, in a country having such a professional system as would afford guarantees equivalent to those exacted from the advocate of the home country, provided that the foreign advocate were associated with a home advocate in the pleading of the cause. The opinion of the Congress was stated by the President to be, that an advocate duly authorized in any country should be allowed to practise in every country. In order to appreciate the ground of this decision, it must be recollected that in France and Belgium the Courts admit by courtesy the foreign advocate to plead, on the sole condition that he obtain the sanction of the Judge presiding in the Court. The

same system, too, prevails in the United States, grounded there on the virtual necessity of admitting for the occasion an advocate being a member of the Bar of another State in the Union. It seems to English notions not only untraditional but unnecessary, since in England a foreign lawyer may be called into consultation as an expert in instructions for the conduct of a cause, or may, as an expert, give evidence of the law or custom of his own State. It seems in practice of little value, because an advocate in any country is of necessity trained in affairs, and has moreover the capacity for rapid acquisition of that extraneous knowledge which may be necessary for the presentment of any cause. The conclusion of the Congress is recorded, as a matter of history, however it may be in variance with the traditional practice and professional opinion in England.

The fifth and last question for the consideration of the Congress may be expressed in the following terms:—“How is it possible to create a permanent and international organisation either free or under State control, whether between the Bars officially established in the different countries or between advocates individually.” Amongst the objects stated by the Committee which was responsible for the framing of the question, were (1) the communication of information regarding both comparative legislation and decisions in the Courts of different States, (2) the organisation of legal assistance to poor foreigners resident in any particular State, and (3) the interchange of opinions, information and assistance, regarding the rights and interests of the professions in different countries. It became clear in the discussion that the Bar of Paris (equally with the Bar of England) would be adverse to the suggestion of a Federation as between Bars themselves, and that any tangible result could only arise from an international combination between individual advocates belonging to the different national Bars.

In the result, the Congress arrived at the decision that an International association of individual advocates should be formed, that the association should be directed by a Standing Committee having its headquarters in Belgium, and that the third Session of the Congress of Advocates should be held in 1908.

From the point of view of the English lawyer, the deliberations of this Congress have not only their interest but also their value. It would not of course be accepted as within the limits of possibility that the Bar of England, any more than the Bar of France, could alter the fundamental character of its constitution, whether resting on historical tradition or on legislative enactment.\* Still less would matters of internal order, discipline, or etiquette, come within the sphere of useful external criticism. But upon some problems, which are constantly agitated and at points become critical, much light may be thrown by the experience of the professions in foreign States of the subjects which formed the staple of the discussions of the Congress. It is strange that whilst there is in England some discontent and sometimes some resentment against our system of government of the profession of the advocate by Inns of Court, there is on the continent a general desire that the advocate should be more free from State control. Again, the two problems of incompatibility of occupations and of fusion of the two branches of the profession, are here presented in a fresh light, and in such a way as to cause hesitation before altering our own system. From the conclusion of the Congress regarding the formation of an International association of individual advocates nothing but good can come. Apart from good fellowship between men, better understanding between nations must come. The bases of International law can be extended. The study of comparative legislation can be furthered. The codification and perfection of insular systems of law can

be advanced. There are many reasons why the Congress of Liège, to which M. Bia, the Bâtonnier, welcomed the members, over which M. Dupont, Vice-President of the Senate, presided, and to which M. Van den Heuval, as the Minister of Justice for Belgium, gave official recognition, will not be found without its lasting influence.<sup>1</sup>

EDWARD COX-SINCLAIR.

## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### Norway and Sweden.

THE draft agreement for dissolution of the Union framed by the delegates of Norway and Sweden at the Conference of Karlstad, and now submitted to the national legislatures for approval, contains terms which do credit to the practical common-sense of both parties, and at the same time satisfy a high standard of modern international relations. Such terms as those which provide for a neutral zone between the two countries, within which all existing fortifications are to be dismantled under the supervision of a foreign officer nominated by each party, and a third chosen by them jointly, or failing them, by the Swiss President: and for equality of access and commerce between the two countries, the common use of the waterways and the maintenance of the grazing rights of the Lapps, represent the practical point of view, while the latter is exemplified by the proposal to submit to the Hague Tribunal all disputes between the two nations which do not affect the independence, integrity, or vital interest of either; leaving it to the

<sup>1</sup> In so far as this article purports to be a record of the proceedings of the Congress, I have the concurrence of my friend, Mr. Valentine Ball, who was elected one of the Vice-Presidents of the Conference, and who expressed the English view on several of the questions under discussion.—E. C.-S.

Tribunal to decide, in case of dispute, whether the particular question in dispute comes within the exception or not, the subject of the present controversy being expressly excluded from this provision. A period of ten years is fixed for the duration of the treaty, and if not denounced by either party two years previously, it continues for another similar period. Whatever the merits or demerits of the present controversy, now it is hoped definitely to be closed, it will not be disputed that the provision for the settlement of future controversies by arbitration indicates an enlightened conception for the future relations of the two States to each other which may produce closer feeling than that which has existed during the official union. Appreciation of arbitration has been shown on previous occasions by the King of Sweden, who has acted as an international judge in issues between other nations; and in an interesting paper contributed to the Conference of the International Law Association at Christiania, last September, Mr. Halvdan Koht, of Christiania University, claimed that Norway has a consistent record of work in this direction since 1814, when she recovered the management of her own affairs. In 1852, when questions arose between Norway and Russia, of breaches of boundaries in Finmark by the nomad Lapps, Norway proposed reference to arbitration, but Russia refused it. In 1868 she concluded a treaty with Siam, referring to arbitration differences which could not be settled by diplomatic means. In 1890 the Storthing addressed the King in favour of negotiation with foreign States for obligatory arbitration treaties in disputes between them and Norway, but Sweden was not sympathetic. The Norwegian Government has also voted annually a sum of money for enabling Norwegian delegates to attend the inter-parliamentary Peace conferences, and from 1897 onwards it has similarly made a yearly allotment to the International Peace Bureau at Berne. In its commercial treaties with Spain (1892), Switzerland (1894),

Portugal and Belgium (1895), it has obtained the insertion of arbitration clauses. The Norwegian Storthing was also selected by M. Nobel (himself a Swede) to choose the recipient of the special annual prize given to the "person who shall have most or best promoted the fraternity of nations and the abolition or diminution of standing armies; and the formation and increase of Peace Congresses." Norway and Sweden are both parties to the Hague Convention, and have obligatory arbitration treaties with France, Belgium, Russia, Switzerland, Great Britain (1904), and Portugal (1905). In 1902 the Storthing approved a project for the permanent neutralisation of both kingdoms, which was, however, rejected when brought forward in the Riksdag; and no doubt this matter will receive early consideration from the new government. A standing example of the material advantages to a small State of having no foreign politics is afforded by Belgium, which, since obtaining its independence, as its representative at the same Christiania Conference, Dr. Stocquart, pointed out, has doubled its population, has now savings bank deposits of over thirty million pounds, and ranks fifth in order of the States of the world for industrial and economic development. Norway already holds a corresponding position as regards its merchant shipping, and with peaceful ideals before it may well gain in commerce the eminence which the war-like Norsemen of old once won for it in military matters.

### **Limitation of Belligerent Rights.**

The Conference of the International Law Association already alluded to will at any rate have provided some material for the use of the second Hague Conference on Public International law when it comes together. The subjects of Contraband, various points in the law of Neutrality and the laws of War, and the question whether Prize Courts should be made international in composition,

produced a variety of suggestions and criticisms. In the first subject a striking proposal was made by Mr. Douglas Owen<sup>1</sup> that the right of belligerents to interfere with neutral mail and passenger steamers by search for possible contraband, should be superseded by the State to which those ships belong undertaking by preventive legislation that they shall not be carriers of contraband, *e.g.*, the British proclamation of neutrality at the beginning of a war in which Great Britain is not a party should, instead of being a theoretical prohibition of trade in contraband, be a penal statute with civil rights of action for loss caused by breach of it; and this was adopted by the meeting. It must, however, be remembered that under the Customs Consolidation Act 1879 our Government can prohibit the exportation of contraband, though the power is not exercised except when the interests of the country are directly concerned (Lord Granville to Count Bernstorff in 1870).

M. Georges Marais (Paris) dealt with the question whether coal should be considered as contraband, and after a review of the recent official and juristic declarations on this point, concluded that it should be regarded as conditional contraband only, and this view was adopted by the Conference. The French practice in its wars of 1854 (Russia) and 1870 (Germany) was to allow free commerce in coal by neutrals with the enemy, and on the former occasion this was in contrast with the practice of her ally, England; but the Anglo-American doctrine is fixed in the sense that the contraband nature of coal depends on its destination, and Japan took the same line in the late war. Whether the supply of coal to belligerent warships comes within the Foreign Enlistment Act or not has been debated by English lawyers, though the Foreign Office seems to favour its

<sup>1</sup> *Vide, Neutral Trade in Contraband of War*, p. 5.

inclusion, and British shipowners would almost certainly not have been allowed the licence recently enjoyed by German shipowners in supplying the Russian Fleet on its journey out.

The same subject in another aspect was handled by Dr. T. Baty, who called attention to the "recrudescence of belligerent pretensions," indicating as main channels of this movement (1) the Russian claim to confiscate ships for carrying contraband when amounting to fifty per cent. of the cargo, this going even further than the French declaration of 1778 that a proportion of seventy-five per cent. contraband cargo would be fatal to the ship, neither of which is allowed by our Prize Court; and (2) the destruction of neutral ships, pointing out that the various national instructions allowing destruction of prizes should only refer to prizes which by the law of Nations the captain has a right to destroy. The British view as expressed by Lord Stowell directly prohibits it, only allowing destruction to be justified by a full restitution of value, when the circumstances raise a case of the gravest importance to the captor's own State. With regard to another proposition which has been advanced in the law of contraband, that the Prize Court is competent to make inquiry into the "intention" of the parties, whether the goods are to be used by the enemy's forces or whether they are ultimately to arrive in the enemy's country, the same author expressed a decidedly negative opinion, upholding the old rule that the ship and her cargo must acquit or condemn themselves, and the Prize Court can only adjudicate on the evidence of the ship's company and the ship's papers. Dr. Baty pointed out that the so-called authorities in its favour are not conclusive; but he has against him the opinion of the Institute and our own recent Royal Commission on Food Supply in War, and the general impression (whether questionable or not) created by the "continuous voyage" cases in the American Civil War



and subsequently, and the current of thought among many modern jurists that the admission of further evidence is permissible. On the other hand, he would reject the proposed limitation to the seat of war of the right to seize contraband.

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M. Gaston de Leval (Brussels) dealt with a series of questions raised during the late war, such as the correctness of hostilities before declaration of war; the public status of the Russian volunteer cruisers; the destruction of neutral prizes; the use of floating mines; the correctness of a neutral allowing messages by wireless telegraphy between belligerent forces to pass over its territory, and the right of a belligerent fleet to sojourn in territorial neutral waters, applying a negative conclusion in every case. On this last point there seems little doubt that the new application of the twenty-four hours' rule and after that internment, has so much convenience in its favour that it will be incorporated into the new codes of the laws of War. There seems every reason to expect that the rights of neutrals on the balance of the general convenience of trade will receive far more attention than they have hitherto, and probably the proposed International Conference will mark a fresh point of departure in International law as distinct as that which the Declaration of Paris effected fifty years ago.

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### International Prize Courts.

The last, and in many ways not the least interesting question of the series, whether Prize Courts should be international in composition, received a good deal of attention and the support in principle of MM. de Leval and Marais and M. Boye of Christiania. But a paper by Mr. Pawley Bate was specially valuable as bringing the proposal down to practical considerations. There is, of course, the well-known difference between the conception of the Prize Court

on the Continent (speaking generally) as a branch of the administrative authority, and the Anglo-American one (connected with the names of great judges) as a judicial tribunal. The present customary Prize Court has been objected to for (1) its seat being in a belligerent country, (2) the fact of its constitution by the belligerent. The first is perhaps unimportant in practice, though theoretically the objection has substance. The second characteristic has been a text for many amendments, dating from Hubner in 1759, in which latterly English jurists like Mr. Westlake have taken their share. A proposal that Prize Courts of first instance should be composed of belligerent and neutral representatives in equal numbers was laid before the Institute, but this was superseded by another in favour of an International Prize Court of Appeal only, to be set up by each belligerent at the outset of a war, the belligerent to have two representatives and neutrals three, which was carried at the Meeting in 1888, by votes of members from the lesser States against those of the larger States such as France, Germany, and Great Britain. In Mr. Pawley Bate's view a necessary preliminary to such a Court (for which he would utilise the Hague Tribunal) is the framing of a general Prize Code which it would be the duty of such Court to apply. In such questions as which party is to discharge the onus of proof of neutral or belligerent conduct, or as to the procedure, there would not be much difficulty in letting the Court decide: and similarly as to the interpretation of an article of the proposed code: but questions not covered by the express provisions of the code would lead to a deadlock. Putting the whole subject on a quasi-legal footing would, moreover, affect the present prerogative of the captor occasionally to forego his rights under the strict letter of the law, and it would interfere with considerations of policy such as measures of retaliation. But none of these objections seem capable of standing against what seems to be

the prevailing current of opinion at the present day, that it is desirable to have one uniform law for governing all these questions, and that a Court like the Hague Tribunal can be trusted to supervise the application of that law in most cases.

### **Extension of the Berne Railway Convention.**

The extension of the Berne Railways Goods Transport Convention of 1890 was another subject of discussion at the same Conference. The idea originated with two Swiss lawyers in 1874, who brought it before the Swiss Federal Council, and the present parties to it are Austria, Germany, France, Belgium, Hungary, Denmark, Russia, Switzerland, Holland, Luxemburg and Roumania, and in 1904, 214,000 kilomètres of railways were subject to it. The effect of it can most shortly be described as making a through contract for carriage of goods by railways designated by the signatory governments from one country to another, subject to uniform rules as to form, measure of damages for loss, the liability of the railway concerned in the carriage of the particular goods to the goods' owner, and the relations of those various railways for that purpose *inter se*. Thus one uniform law governs throughout a transit of goods, and the owner has a direct remedy against any of the railways concerned. In actions brought on "through contracts," a judgment in one signatory country can be enforced in another, and no security for costs can be demanded from a subject of another signatory State. The term "lines of railway" has been understood to include sea transits forming communications between one railway and another, and on this footing there is nothing to prevent countries like England and Norway from joining the Union. This was advocated by M. Platou (Christiania), Director Winkler (of the Central Office of the Union at Berne), Mr. Schroder (Zurich), and M. Poincard (Berne), and the Council was requested to bring the matter to the attention of the British commercial bodies.

### **The Recognition of Foreign Companies.**

The Conference had submitted to it a report by Mr. W. F. Hamilton, K.C., and others, embodying a code of rules for the international recognition of foreign companies, largely based on the recent Norwegian project for that purpose, and the New Zealand Companies Act of 1903. The chief provisions were, that in every country a foreign company which has been duly registered abroad should be recognised as if registered there: that its domicil should be deemed the place of its incorporation, and that the law of its domicil should govern the liability of any of its members or its acts and contracts: that it must carry on business there by an attorney or person appointed by notarial instrument and domiciled there, whose acts should bind his principal within those local limits: before trading it must be registered in the place where its statutes ought to be registered, and its constitution and government must be similarly registered: and legal process may be made upon it at its registered place of business. It will be remembered that in England no corporation can acquire land except under licence of the Crown or an Act of Parliament, and foreign companies are not provided for by statute. They have the compensating advantage that they are exempt from the restrictions of the Companies Act as to issuing prospectuses and the like.

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### **The Legal Relations of Charterers and Shipowners.**

This question, brought before the Conference by Professor Platou, of Christiania, has formed the subject of protracted discussions at Conferences of the International Law Association by representatives of the shipping interests: but all attempts in England to determine the limits of the shipowner's liability towards the shipper by contract have so far failed. The London Conference of 1893 considered a model bill of lading called the London Rules of Affreight-

ment, of which the effect shortly was that the shipowner was to be liable for loss or damage owing to the ship being unsuitable for cargo, or unseaworthy at the beginning of the voyage, or for mishandling of goods, but that he could contract himself out of loss by accidents of navigation, even when caused by the negligence of the captain, pilot, or other specified person; but the "negligence" clause has continued to exclude by express words all causes of loss or damage shown to be of likely occurrence. Legislation has, however, been resorted to in the United States by the Harter Act, and in Australia by a recent Act on similar lines, which provide that shipowners cannot relieve themselves of liability for negligence or default in the loading or the custody or delivery of the goods, but can contract themselves out of liability for damage caused by errors in navigation, while they remain liable for seaworthiness and proper care of the goods. The Chambers of Commerce in the Hanseatic cities, and the Commercial Congress of Copenhagen held in 1903 have, moreover, adopted resolutions that legislation in the matter is desirable, for the limitation of the negligence clause, and bills of lading are coming into use in Germany based on the lines of the Harter Act, which are being accepted by important German interests. A proposal by Professor Platou in favour of compulsory legislation for regulating the relations of shipowners and charterers, in the same direction as those indicated in the Harter Act, was, however, not adopted by the Conference.

In this connection, the question of the position of a bill of lading holder of goods in a chartered ship was discussed by Dr. Stubbs, who advocated an uniform law as to the legal effect of a bill of lading as advisable, even if international agreement has not yet been obtained as to its form, after exhaustive discussion at the meetings of the Association in Liverpool (1882), Hamburg (1885), and London (1887).

The English law on this matter is not clear, depending almost wholly on Case law, and it does not seem to be dealt with comprehensively in the Continental codes. A comparison of the general rules of the various systems on this point might lead to the formulation of international rules which would be of general commercial advantage.

G. G. PHILLIMORE.

## VII.—NOTES ON RECENT CASES (ENGLISH).

IT is often given as an argument in favour of codification that unless some such course is taken, the terrific number of cases yearly reported will soon reduce the science of law to a beggarly knowledge of indices. The law reporting in Chancery during the last three months cannot be called terrific. It runs just to about two hundred pages. Yet, as is often the case, quality here is as conspicuously present as quantity is conspicuously absent. Every case reported is well worth study.

One of the most interesting of them is *Higgins v. Betts* (L. R. [1905], 2 Ch. 210). That case contains a most interesting discussion of the law as to ancient lights, as laid down in *Colls v. Home & Colonial Stores, Ltd.* (L. R. [1904], A. C. 179), and an application of it to a case of obstruction. In commenting on *Kine v. Jolly* (L. R. [1905], 1 Ch. 480), (*Law Magazine*, August, 1905, at p. 488), we protested against the dictum of Vaughan Williams, L.J. (at p. 495), that in order to see if there is any obstruction it is necessary to take into consideration the amount of light received previous to the obstruction. In *Higgins v. Betts* (*supra*), at p. 215, Farwell, J., points out that that is just the point upon which the House of Lords in *Colls' Case* (*supra*)

turns. He says the Chancery cases which that case overrules, turned on the question how much is taken away; while *Colls' Case* turns on the question, how much is left.

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*Mellor v. Walmsley* (L. R. [1905], 2 Ch. 164) seems to create a new sort of easement. A. sells a piece of land, which is described in the conveyance as being bounded on one side by the seashore. The plan, however, and the measurements in the parcels, seem to leave a certain space between the plot granted and ordinary high water-mark. The sea has gradually receded and now the question arises, to whom does the new land belong. The majority of the Court (Romer, L.J., dissenting) held, that notwithstanding the description of the land granted as being bounded by the seashore, the plan and measurements show that a strip between the land granted and the foreshore was not, in fact, granted to the grantee. They hold, however, that the description in the deed estops the grantor from preventing the grantee having access to the foreshore. Why it does not also estop him from claiming the intervening strip as his property is somewhat difficult to understand. Romer, L.J., thinks it should, and in our humble opinion he is right. Moreover, as it is the rule, as laid down in *Birmingham, Dudley & District Banking v. Ross* (L. R., 38 Ch. D. 295), to interpret deeds of grant by the aid of surrounding circumstances, and it was admitted here that the grant was intended to carry all land to the seashore, this consideration goes to support the view of Romer, L.J.

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Note that an option to purchase the reversion contained in a lease comes within the rule against perpetuities. So, at any rate, it was held by Warrington, J., in *Woodall v. Clifton* (L. R. [1905], 2 Ch. 257). The Court of Appeal, though not dissenting from this view, also held that such

an option does not come within 32 Hen. VIII, c. 34, and therefore does not run with the reversion, even though the purchaser of the reversion bought with notice of it, unless it is good as a contract for an interest in the land, and therefore to continue not more than twenty-one years.

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*Villar v. Gilbey* (L. R. [1905], 2 Ch. 301) is a good example of the difference the Court makes in reading expressions in instruments according as they vest or defeat estates. In order that a grantee or devisee may take an estate, "born in my lifetime" "already born" and "living at my death" and such like phrases have often been held to include a child *en ventre sa mère*. But when, as in *Villar v. Gilbey* (*supra*), these expressions are applied to the cutting down or defeated of an estate already vested they are to be read in their natural sense.

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*Lord Kinnaird v. Field* (L. R. [1905], 2 Ch. 306) establishes a very useful principle. In that case one of the parties had in the course of the proceedings made something like fifty interlocutory applications. The judge, holding that these were mostly frivolous and vexatious, made an order directing that no more interlocutory obligations should be made by him without the consent of the Court. On appeal this order was affirmed.

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*Shepherd v. Harris* (L. R. [1905], 2 Ch. 310) is a very doubtful decision. There the defendant, a trustee, employed his co-trustee, who was a stockbroker, to sell and re-invest certain stock. This was in April, 1900. The defendant did not attend to take delivery of the purchased inscribed stock, and it seems that it is not customary for purchasers to do so. In fact the co-trustee did not purchase any stock, though he assured the defendant that he had done so. Another similar



transaction took place in September 1902. In October of that year the co-trustee was expelled from the Stock Exchange, and it was then discovered that he had made no re-investment of the trust funds. The Court held that, as it was not customary for purchasers to attend for delivery of inscribed stock, the defendant was not liable. He was certainly not liable merely because he did not attend, any more than a trustee who allows, under reasonable circumstances, a co-trustee to receive trust money, is not liable if the co-trustee immediately converts it to his own use. But surely he should be held liable for not subsequently, within a reasonable time, ascertaining in some way or another that the stock was duly inscribed in his own and his co-trustee's names? Strange to say, the case which clearly establishes this liability, *Bostock v. Floyer* (L. R. [1865], 1 Eq. 26), does not seem to have been cited.

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In *Re Marshall's Settlement, Marshall v. Marshall* (L. R. [1905], 2 Ch., 325), it is decided that a jointure and terms for raising portions subsisting between a life estate and the remainder in fee, both vested in the settlor, is sufficient to bring the settlement within the Settled Land Acts 1882, as a settlement creating interests in succession.

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In *re Guedalla, Lee v. Guedalla's Trustee* (L. R. [1905], 2 Ch. 331) is a very interesting and peculiar case. There a deceased testator was a bankrupt. He had a general power of appointment by will over a settled fund. As this was not a power under which he could appoint to himself, it did not on his bankruptcy vest in his trustee. He incurred further debts after his bankruptcy, and by his will he appointed to a creditor whom he made his executor. He was at his death still an undischarged bankrupt. His trustee in bankruptcy applied to the Court for the funds appointed, on the ground

that the appointment made them part of his estate. The Court held that he was not entitled to them, but that they went to the appointee subject to the payment of all debts incurred since the bankruptcy.

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R.S.C., Order LIV, A. is only intended to enable the Court to decide on an originating summons "questions of construction where the decision of those questions, whichever way it may go, will settle the litigation between the parties." Per Warrington, J., in *Lewis v. Green* (L. R. [1905], 2 Ch. 340, at p. 344).

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In *In re Chic Limited* (L. R. [1905], 2 Ch. 345), Warrington, J., made an order winding up an insolvent company which was being carried on by debenture holders, though the petitioners were not in a position to show that they could in any way benefit by the order. Considering how often this iniquitous trading by debenture holders in the name of an insolvent company has been denounced—see, for example, per Buckley, J., in *Re London Pressed Hinge Co. Ltd.* (L. R. [1905], 1 Ch. 576)—this order has been made none too soon.

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J. A. S.

*Moran, Galloway and Co. v. Uzielli* (L. R. [1905], 2 K. B. 555), which deals with a question of insurable interest, has the distinction of being included in the Reports, although it was argued on circuit. The plaintiffs, in order to cover past and current disbursements on a foreign ship of the defendants, insured it, as their agents, against total constructive loss, which ensued. The freight which the plaintiffs received was insufficient to cover their claim, and the question then arose whether the unsatisfied balance gave them an insurable interest in the ship. First of all, they had no maritime lien on the vessel, for none is given

by a supply of necessities; and though every maritime interest, legal or equitable, dependent on sea risks is insurable, a mere expectation is not. Even advances for repairs are not, unless they are secured by a lien. An ordinary debt would give no insurable interest, as the right to the money due would remain whether the ship was lost or not. If a debt had this power, every creditor of a shipowner would have an insurable interest in all the maritime risks of the debtor. On these grounds the plaintiffs would have failed. But 3 & 4 Vict., c. 65 (1840), "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty," gives the Court power to enforce payment for necessities supplied to any foreign ship. The Court therefore decided that the plaintiff's claim conferred an insurable interest, as to hold the contrary would be "to impose an unnecessary fetter upon ordinary business."

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In an ordinary agreement to rent from year to year the tenant is frequently ignorant of the date on which he must give notice to end the tenancy. There, however, the rule is well established. But when parties vary the form, they may find that, for their version, there is no rule of interpretation. In *Lewis v. Baker* (L. R. [1905], 2 K. B. 576; 74 L. J. R., K. B. 617) a house was let at a yearly rental, payable as to one-fourth on the thirteenth of every third month "from the 13th of May last until such tenancy shall be determined" by either party giving three calendar months' notice in writing. After full consideration, one of the most able judges, admitting that the case was not free from doubt, was of opinion that the agreement created a yearly tenancy with three months' notice to quit. This is probably the best decision. But it would not be unreasonable to think that it was a notice given three months before the ensuing pay day that was intended.

In *Ocean Accident and Guarantee Corporation v. Ilford Gas Co.* (L. R. [1905], 2 K. B. 493; 74 L. J. R., K. B. 799), the Court of Appeal have extended to the second mortgagee the rule that a right of action for trespass committed before entry dates back, if entry is made, to the time when the right to enter was acquired. Of course the case is a peculiar one. The second mortgagee, having guaranteed repayment of the first, was authorised by deed to enter at any time and receive the rents. When the trespass was committed the mortgagor was in possession. Then the second mortgagee foreclosed, and as his right to enter accrued as soon as the deed was executed, and before the trespass, he was successful in his action. Though the rule is that to sustain an action for trespass to land possession must be exclusive (*Revett v. Brown*, 5 Bing. 7); a reversioner, though not in possession, has been held entitled to sue (*Cox v. Glue*, 5 C. B. 533) when the injury was of a permanent kind affecting his reversion.

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*Davis v. Petrie* (L. R. [1905], 2 K. B., 528) has vaulted at once into the position of a leading case. It decides that payment to the trustee of a creditor's deed is not protected under sect. 49 of the Bankruptcy Act, inasmuch as the execution of such a deed is an act of bankruptcy in itself, and one that cannot but be known as a fact, though very probably not in its legal effects, to the person making payment under it. In this particular case, the execution of the deed was the very act of bankruptcy alleged, and the unfortunate defendant who had paid the trustee of the deed had to pay again to the trustee in bankruptcy.

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It was part of the decision from which *Braithwaite v. Foreign Hardwood Company* (L. R. [1905], 2 K. B. 543; 74 L. J. R., K. B. 688) was an appeal, that if one of the parties

to a contract for the supply of goods by instalments finds that a portion of the first instalment is not of the agreed quality, he can repudiate the whole contract. The authorities, it may be with deference suggested, hardly support this doctrine. But the ruling of the Court of Appeal on the point was not called for, as decisive judgment was given in the case upon another point. The defendants had entered into a contract to take cargoes of wood, but before the first was shipped, repudiated the whole undertaking on the ground that a collateral oral agreement had been broken. Later on they discovered that a portion of the first shipment was defective. It was held at the initial hearing that no oral agreement had been made, and therefore that the repudiation was wrongful. The appeal was unsuccessful, as the defendants were not in a position to use their after-acquired knowledge; and so unfortunately the Court felt itself relieved from pronouncing on the effect upon the whole contract of a fault in part of an instalment of the subject-matter.

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*Morel Brothers v. Westmoreland* (L. R. [1904], A. C. 11) settled that if judgment is obtained against a wife for the value of goods supplied to the joint household, judgment cannot afterwards be obtained against the husband for the same amount. The effect of *French v. Howie and Wife* (L. R. [1905], 2 K. B. 580; 74 L. J. R., K. B. 853) is, that two persons can be severally liable for an undivided debt which is not a joint one! To a claim for goods supplied to the order of the wife, who was living with her husband, she admitted her liability for an amount which she averred was the real sum due, and an order was made against her with leave to both her and her husband to defend on the balance; but the jury found that there was no joint liability, and that credit, which the wife had authority to pledge, was given to the husband. The Divisional Court confirmed the claim against the husband for the balance; but Jelf, J., strongly

differed, and with him the weight of argument seems to lie, for "a judgment that the wife is liable for part of the undivided debt and the husband for another part would be inconsistent and self-contradictory."

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Under sect. 12 of the Married Women's Property Act 1882, which gives to a wife for the protection of her own separate property the same remedies against her husband that a *feme sole* would have, there is no doubt that a married woman can by action hold her husband responsible for damage to her goods. But whether action would lie merely for the recovery of goods which he was detaining was questioned in *Larner v. Larner* (L. R. [1905], 2 K. B. 539; 74 L. J. R., K. B. 797). The Court held that it would, but not without judicial misgivings whether sect. 12 was not limited by sect. 17: misgivings, however, not perturbing Jelf, J., who was of opinion that sect. 17 was intended to enable simple questions of title or possession to be dealt with in a summary way, and that it is impossible that such a limited permissive right could cut down the effect of sect. 12. This seems a sensible view; but leave was given to appeal.

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There is much that is anomalous still in the position of the married woman. In some respects she is superior to man in her legal privileges. In others, remnants of her ancient subordinate position hang about her. It would help to remove some of these, and add to the public benefit which is of more consequence, if an Act were passed releasing her husband from liability for her torts, and placing her more nearly on the desired equality with mere man by making her, just as he is, liable to imprisonment for contempt in refraining to comply with the judge's order to pay her debts.

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T. J. B.

## SCOTCH CASES.

The difficulties connected with section 100 of the Bills of Exchange Act 1882, to some of which we referred last year (Vol. XXX, p. 101), are further illustrated by *Manchester & Liverpool Banking Company, Limited v. Alexander Ferguson & Company* (42 Sc. L. Rep. 649). The section bears that "In any judicial proceeding in Scotland any fact relating to a bill of exchange which is relevant to any question of liability thereon may be proved by parole evidence." The bill in question was held by an English banking company, which was averred by the defenders to have been a party to a verbal arrangement by which the bill was not to be enforced except in certain specified circumstances. The question was, whether the agreement averred was relevant to liability, and therefore provable "by parole evidence." Precedents are to be found on either side, but the Court preferred to follow *Gibson's Trustees v. Galloway* ([1896], 23 R. 414) rather than *National Bank of Australasia v. Turnbull & Company* [(1891], 18 R. 629). Lord Kyllachy was of opinion that though some of the cases cited went very far, the Court was asked in this case to go further than had ever yet been proposed by way of contradicting a written probative document. The averments could not have been admitted to probation under the old law of proof by "writ or oath," nor did they seem to come within the section in any reasonable sense.

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*Hyslop v. Shirlaw* (42 Sc. L. Rep. 668) related to a sale of pictures by one friend to another, and to an alleged warranty that they were the genuine work of certain well-known masters. Neither of the parties was a dealer in art, but the defender had acquired a collection for his own walls which had given him a local reputation as an art connoisseur. The proof was conflicting, but

according to the evidence of a mutual friend who was present, the defender gave no warranties, though he expressed strong opinions as to the authenticity and value of the pictures. In the receipts for the prices, however, the pictures were described as "by Gainsborough," or "by Phillips," or otherwise as the case might be. The pursuer averred that he trusted to the defender's skill in a matter regarding which he knew nothing. The pictures were removed to the pursuer's house, and it was not till the lapse of eighteen months that on the suggestion of another friend the pursuer was induced to believe that they were not genuine. He accordingly raised this action as upon a warranty. The *bonâ fides* of the defender was not called in question. The Court (reversing the Sheriff-substitute and the Sheriff) held that the pictures had been accepted as in fulfilment of the contract, and that even if there had been a warranty (which was more than doubtful), the pursuer had lost his remedy by retaining the pictures without any immediate inquiry as to their genuine character.

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During the last quarter several Scotch cases under the Workmen's Compensation Act illustrate the difficulties and inequalities arising from the partial character of the Act. This is particularly obvious in the interpretation given to sect. 7 of the Act, partly on account of the series of definitions given in the section itself and partly by case-made law. Thus, in *Coylton Coal Company v. Davidson* (42 Sc. L. Rep. 596), the much-canvassed question as to what is meant by the words "on or in or about a factory, mine," etc., was brought up under the following circumstances. A carter in the employment of a coal company had gone with his cart from the pit to a railway siding in order to load timber from a railway waggon. The road along which he travelled was a private one belonging to the pit, until it joined a public road 259 yards from the pit. The carter crossed the public



road and entered the railway premises by an adjacent gate. While there and while engaged in his duties he was accidentally injured. The Court held that he was not "on or in or about a mine" within the meaning of the Act. It was argued for the workman that sect. 7 of the Act did not refer to the locality of the accident, but to the kind of employment which was to give a right to compensation. The question, therefore, was not whether the workman was injured "about" the mine, but did he belong to the class of workmen the *locus* of whose ordinary employment was "about" the mine. Sect. 7, it was said, was merely explanatory of and complementary to sect. 1, which was the leading enactment (*Lysons v. Knowles and Sons Limited* (L. R. [1901], A. C. 79, *per* Lord Halsbury at p. 85)). This view had never before been presented to the Court of Session; but the Court found themselves unable to give effect to it in the face of the express enactment of sect. 7. Lord Stormonth Darling, however, expressed strong sympathy with the claimant's contention. His lordship was unable to see why so much importance should have been attached to the *locus* of the accident itself, for a workman is just as much in his master's employment when he is loading goods for him at a distance from his master's premises as when he is delivering the goods at his master's door.

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Another interesting case under the Workmen's Compensation Act was *Singer Manufacturing Company v. Clelland* (42 Sc. L. Rep. 757), by which the Scottish practice of making a nominal award for the purpose of keeping the matter open was disapproved. This practice had been previously sanctioned by the Court of Session in the case of *Freeland v. Macfarlane, Lang & Company* ([1890], 2 F. 832), where a sheriff had refused compensation to a boy for the loss of a thumb and three fingers because his employers had again taken him into their employment at the same

wage. The Court in that case remitted back to the Sheriff with the declaration that he ought either to have followed *Irons v. Davis* (L. R. [1899], 2 Q. B. 230) (nominal award of one penny per week), or *Chandler v. Smith* (L. R. [1899], 2 Q. B. 506) (declaration of liability without any award). Since the date of *Freeland's Case* (*ubi sup.*) it has been very common in the Sheriff Court to make a nominal award of one penny per week, but the Courts have now taken another view of that procedure which, not without reason, they characterise as both illogical and inexpedient. In the opinion of the Court, the point on which the Sheriff should have concentrated his attention was not wages earned, but capacity to earn wages. Although the generosity of his employers may for the time have prevented any pecuniary loss, the workman may not be able to earn the same wage in any other employment. The damages arising from this incapacity should be assessed at the time, and not postponed merely because there was no direct loss of wages. It might be different where the incapacity itself was uncertain, as where time was required to show the extent of the injury for which the damages were claimed.

R. B.

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• IRISH CASES.

*Delany v. Keogh*, ([1905], 2 Ir. R. 267), shows that the House of Lords' decision in *Derry v. Peek* (L. R. [1889], 14 A. C. 374) has not yet ceased to exercise a somewhat disturbing influence on judicial minds in actions of deceit. The pure Common-law action of deceit is, perhaps, not very common now-a-days. When it does occur, and the question of the defendant's state of knowledge with reference to his representation comes in issue, there seems room for abundant difference of judicial opinion in the application of professedly settled law to facts. In the present case, the defendant was an auctioneer employed to sell a public-

house. An advertisement published by him described the premises as "held under lease for a term of years at £25," and stated that "a rent of £18 yearly has been accepted by the landlord for several years in lieu of said rent of £25." Some days before the auction the landlord communicated with the defendant, stating that in future he would insist on payment of the higher rent. Thereupon the defendant consulted the solicitor who had employed him to carry out the sale, and was advised by him that the landlord was estopped from recovering more than £18 a year. The defendant believed this opinion to be correct. He went on with the auction, and read the statement as to the rent without comment. The plaintiff became the purchaser, believing that the landlord could recover the full rent, but thinking he would be content to receive the reduced rent. He was subsequently sued by the landlord for the full rent, and compelled to pay. He then sued the auctioneer in an action of deceit. The case, of course, turns largely on the view taken as to what representation was to be implied from the mere reading of the advertisement, and what was the defendant's state of mind as to such implied representation, having regard to the landlord's communication to him and the solicitor's advice. The majority of the Divisional Court, including the Lord Chief Baron, held that the defendant had no intention to deceive, that he did not state what he knew to be untrue, and was therefore not liable. The Court of Appeal reversed this, holding that the statement in the advertisement implied a representation that the vendor had no reason to believe that the reduction in the rent would be discontinued: that this representation was false to his knowledge, and that the defendant was therefore liable.

Discussions of judicial differences as to the effect of evidence are not generally profitable: and there was no material difference between the Court of Appeal and the

King's Bench as to the general law. A *dictum* of Holmes, L.J., is noticeable: "I have observed, not for the first time, in the discussion of this case, the prevalence of an idea that *Derry v. Peek* has laid down a new rule in actions of deceit, and has given a latitude to falsehood that did not previously exist; this seems to me a great mistake." Does this idea really prevail? We thought that the common-sense summary of *Derry v. Peek*, generally accepted, is that a man cannot be said to tell a lie when he really believes what he says, and we fail to see how this could be thought to give any latitude to falsehood. Nor are we sure, despite the Court of Appeal, that the defendant in the present case did not really believe the representation which he thought he was making.

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*In re Anna Long* ([1905], 2 Ir. R. 343) is a net decision on a short point under the Married Women's Property Act 1882, previously uncovered by authority. Sect. 1 (5) enacts that a married woman carrying on a trade separately from her husband shall be subject to the bankruptcy laws like a *feme sole*. The case decides that a married woman carrying on a farm separately from her husband is not carrying on a trade, and is not a trader within this section, or the definition section of the Irish Bankruptcy Act 1857.

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If a railway company undertakes the carriage of a drunken man (of course, with notice of his drunkenness), what is the measure of its responsibility to other passengers for harm caused them by his drunken acts? Such is the question raised, and to some extent answered, by a curious case of *Adderley v. Gt. Northern Rly. Co.* ([1905], 2 Ir. R. 378). A., a lawful and peaceable passenger, is sitting in the corner of a carriage at a station; just as the train is starting, something suddenly breaks the glass of the window; the fragments pierce A.'s eye and injure it seriously. This

"something" he subsequently finds to have been the fist of B., a drunken cattle-dealer who had a season ticket from that station. B. had been seen very drunk outside the station; he had passed the ticket-checker who, in the jury's opinion, saw that he was "obviously drunk," and had gone upon the platform. There he had made some move towards entering a first-class carriage, when the station-master, noticing his condition, had called to a porter, "Keep that man back." Accordingly, the porter had taken hold of B., and was leading him along the train (as the jury thought, in order to put him into a third-class carriage), when B. suddenly swung out his arm and broke the window, with the result above mentioned. A. sued and recovered damages against the Company. The majority of the Divisional Court directed judgment to be entered for the defendants, chiefly on the ground that, even assuming negligence on the part of the Company's servants, the damage was too remote. The Court of Appeal were unanimous in holding that there could not be judgment for the defendants, but ordered a new trial—partly because the damages awarded were in their opinion excessive, but also because they considered the case had been left to the jury on the assumption that the reception by the Company of a man, "obviously drunk," rendered them *absolutely* responsible for any harm done by him. This assumption the Court held to be erroneous, and an over-statement of the Company's real liability.

The assumption in question, and the phrase "obviously drunk," seem to have been derived from a case of *Murgatroyd v. Blackburn Tram Co.* (3 T. L. R. 186, 451). There the conductor of an omnibus had allowed a man obviously drunk to go upon the top of the 'bus, where he sat on the rail near a woman and her child. In a lurch of the 'bus he fell against the woman, knocking her and the child down the stairs, whereby the child was killed.

Lord Esher, M.R., and the Court of Appeal held that the company was liable. The Irish Court of Appeal in the present case fully accepted that decision as right on its facts, as the conductor was clearly negligent under the circumstances. But they denied the inference sought to be drawn from it, that a carrier receiving a drunken, or even an obviously drunken person, thereby becomes absolutely liable for anything such person may do in the way of damage to others.

What, then, is the carrier's liability in such a case? It is a liability to take reasonable care to prevent the drunken person doing harm. If he is obviously drunk, or if he is violent, the standard of such reasonable care may well be very high. But the test applicable is the ordinary test of negligence. The Company's duty, says Fitzgibbon, L.J., is to use "due and reasonable care, having regard to his condition, to prevent injurious consequences to other passengers arising from that condition . . . . The duty of the porter was to use all reasonable care that the man should not get an opportunity of doing any mischief *reasonably likely to be done by a drunken man.*" And Holmes, L.J., puts the test thus: "The critical point is, were reasonable precautions taken to prevent injury to passengers after he was taken in charge by the porter?"

Two principles emerge from the decision. First, a drunken man does not belong to that "excessively dangerous" class of things which come within the rule in *Fletcher v. Rylands*. Were it so, the mere occurrence of injury caused by his acts, would, of course, be enough to fix the Company, which had brought him upon its premises, with liability. The chief value of the case to railway companies is its definite negation of this view. But second, a drunken man is a "dangerous thing"—using those words in the well-known sense which they have acquired as a rubric in the law of torts. He is somewhat analogous to the

loaded gun or the jar of acid, whereof the custodians must take great care. Whether the Company accepting him for carriage have exercised sufficient care is in every case a question for the jury, who are by no means likely to apply too lenient a standard. Some positive evidence of want of care there must be, beyond the mere occurrence of an injury—though probably slight evidence will suffice to sustain a verdict for the plaintiff.

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*Waddell v. Harshaw* ([1905], 1 Ir. R. 416), is a decision upon a doubtful point hitherto lacking direct authority. When does the period of limitation, in an action to recover a legacy, begin to run? From the death, or from the end of the "executor's year?" The Master of the Rolls said, from the end of the year; the Court of Appeal, over-ruling him, say from the death. If the matter were quite open, we should be inclined to prefer the opinion of the Master of the Rolls; but the Court of Appeal thought it governed by the decision in *Hornsey Local Board v. Monarch Investment Building Society* (24 Q. B. D. 1). That case is undoubtedly an authority on the point in issue, except that it was not directly concerned with a legacy.

The question turns upon the construction of section 8 of the Real Property Limitation Act, 1874. "No action . . . shall be brought to recover any sum of money secured by any mortgage judgment or lien, or otherwise charged upon or payable out of any land or rent, . . . or any legacy, but within twelve years next after a *present right to receive* the same shall have accrued to some person capable of giving a discharge for or release of the same." When does the present right to receive a legacy accrue? It seems hard to say that it accrues on the testator's death, when the legatee cannot recover the legacy by action until the expiration of a year. What is meant by a "right to receive?" Anybody has a right to receive, in one sense,

anything that may be given him; but surely the section meant more than this. And can the legatee's right be called a *present* right to receive until the end of the year? Is it not till then rather a future right?

Some such considerations would seem to support the *dictum* (only a *dictum*) of Lord Romilly, in *Earle v. Bellingham*, (24 Beav. 418), which is distinctly in favour of the view that the time of limitation for legacies runs from the end of the executor's year. "The right to a legacy and the right to receive it are quite different things; the right to receive does not arise till twelve months after the death."

Still, there is the *Hornsey Case*. That was a decision on the same section, but dealt with money charged on land. A local authority had made a street frontage to lands; the expenses thereof, as is well settled, become a charge on the lands from the time when the works are done, but do not become payable till apportionment. It was held by the Court of Appeal, in an action for their recovery, that the Statute of Limitations runs from the time when the works were done, and not from the time of apportionment. In the present case, the Irish Court of Appeal professed themselves unable to distinguish the *Hornsey Case*, which they followed and applied to the case of a legacy also.

The matter is therefore beyond the consideration of any tribunal short of the House of Lords. As similar delay on the part of a legatee is likely to occur but seldom, it may be long ere that House has an opportunity of reviewing the problem. But should such an opportunity ever arise, it will be interesting to ascertain whether a right to receive a legacy does not, in law and in sense, mean a right to enforce its payment.

J. S. B.

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## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*Copyright in Congress.* Prepared by THORVALD SOLBERG, Register of Copyrights. Washington: Government Printing Office. February, 1905.

*Report on Copyright Legislation.* By the Register of Copyrights. Washington: Government Printing Offices. 1905.

In America it seems, as in England, a revision and codification of the Acts relating to copyrights is under consideration. It is to be hoped that more progress in the matter is being made there than here. Judging from the two volumes above referred to, this should be so. While here the Bill, which has had such an ignominious career, has been prepared by a private committee of busybodies without special knowledge of the subject, in America the registrar—or register as he is there called—of copyrights has been instructed to prepare the ground for legislation by producing the above blue books, as we would call them. And he has done his work elaborately and excellently well. If, having these volumes before it, Congress legislates without wisdom and knowledge, it will only have itself to blame.

The first of the above volumes consists of a chronological record of all proceedings in Congress in relation to copyright from 1789 to 1905. Authors have at all times been known to be a quarrelsome and irritable race. This characteristic appears to apply to legislation and contemplated legislation affecting them. Ever since books were first published in England, the copyright question has been in a state of crisis. The same seems to be the case in the United States. Since 1790 twenty-six Acts have been passed, and no less than two hundred Bills have been introduced into Congress, all dealing with copyright. The chief Act is that of 1870, now Title LX, chapter 3, of the United States Revised Statutes 1873. But eleven Acts have since been passed amending it; and these are largely concerned with the protection of the home printing trade. The result of all this was neatly summed up by the Attorney-General of the United States, when he was asked to advise as to the present state of the law. "Under this kind of legislation," he said, "it is impossible to arrive at any satisfactory conclusion as to what Congress really did intend by it." The voice is the voice of the Attorney-General of the United States, but the words might be the words of Sir Robert Finlay.

The second volume is a report as to the present state of the law in the United States. It gives not merely the text of the present law, but contrasts it with the law prevailing in nearly every foreign country. This is a most able and illuminating piece of work, though the references to English law are somewhat slight, and sometimes not altogether accurate. We may perhaps be permitted to carry some of these contrasts a little further. Thus in America three conditions must be fulfilled before copyright arises in a new work. First, the title must be filed at the registry of copyrights before publication. In the second place, two copies must be deposited at the Library of Congress within ten days after publication. And, in the third place, every copy published must have a notice that it is copyrighted printed in it. In English law we have both registration and delivery of copies. But neither of these is a condition precedent to obtaining copyright. Registration is merely a condition precedent to bringing an action for piracy. And delivery of copies is merely a device to secure, at the expense of authors and publishers, free copies of all publications for certain great libraries. The third condition has no existence in England as regards literary copyright, but it is made a condition with regard to the right of performance of certain musical compositions. And if the present tendency to protect matter published in newspapers continues, it will soon be necessary in order to prevent blackmailing actions, to apply it to such matter.

That suggests another difference between English and American law. In America matter published in newspapers is not the subject of copyright. That was held also to be the case here by Malins, V.-C., in *Cox v. Lord and Water Journal Co.* (L. R., 9 Eq. 324), but that decision was over-ruled in *Walter v. Howe* (L. R., 17 Ch. D. 708). As regards periodicals, too, in America, every issue must be separately registered: here it is sufficient if the first issue only is registered, though in practice it is usual to register separately the issue from which the pirate has stolen the matter in question in the intended action. An English author can now secure copyright in the United States by fulfilling the above conditions, and having, before publication, had the whole book "set up" in the United States. The latter, as Mr. Stolberg, the registrar, points out, prevents many authors from claiming copyright, since it means usually a double composing of the same book—one in

England, the other in America. Authors in foreign tongues can secure copyright more easily. By an Act passed this year, they may obtain it by depositing a copy in the Library of Congress within thirty days after publication, and printing in it and all copies sold in the United States a notice that it is copyright. For all who take an interest in the subject of copyright law these volumes, and especially the report, are well worth perusal.

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*Constitutional Law of England.* By EDWARD W. RIDGES. London: Stevens & Sons. 1905.

Mr. Ridges has produced a work which should be very useful, either to give a student of Constitutional law a "comprehensive and succinct view of English legislative, executive, and judicial institutions, both at home and in dominions and dependencies of the Crown over sea," or to act as a work of reference for any points that may require examination. It is quite up to date, as it gives an account of the re-organisation of the War Office, and Mr. Arnold-Forster's scheme. The subject of Imperial Federation is naturally treated at some length, and besides dealing with the federations of Canada and Australia, an examination is made of the Constitutions of the United States and Switzerland. "Requirements for Successful Federation" and "Proposed Federal Constitution" are discussed, and certain "General Conclusions" drawn which are well worth attention. "Martial Law" is treated in an interesting and instructive manner, and a distinction is properly drawn between Martial Law at Common Law and Martial Law by Prerogative. On the latter subject the law is summed up in a series of five conclusions to which we recommend attention. We have looked over the book with some care and have found it clear and accurate throughout.

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*Jeremy Bentham.* By C. M. ATKINSON, M.A., LL.M. London: Methuen & Co. 1905.

Mr. Atkinson has given us a very interesting sketch of Jeremy Bentham and his works. Few of us are aware of the influence his writings have exercised on the legislation not only of our own, but of many foreign countries. It is difficult to imagine that the "*Traité de Législation*" should have had a considerable sale both in London and the Spanish Peninsula, and have rapidly become known in "Italy, Greece, and even South America." Mr. Atkinson has shown

skill and taste in dealing with the great masses of material at his disposal: Bouring's edition of Bentham contains 5,500 pages printed in double columns, and the Memoirs contain nearly 800 pages more. The accounts of his early life, time at Oxford, and visits to Bowood are charmingly told. The wide range of subjects on which he wrote, the curious manner in which many of his works were edited and published, and the results flowing from them are all shortly but clearly indicated; but we could have wished that the last subject, namely, the legal reforms which may be fairly attributed to the influence of Bentham, had been more elaborated. It is curious to observe how in late life his political opinions became much more advanced; probably through the influence of James Mill. It is interesting in these days to note his pamphlet entitled "*Emancipate your Colonies!*" showing the uselessness and mischievousness of distant dependencies to a European State. It is also curious to note how his style, originally precise and polished, became in later life intricate and tedious; and how of the many words he invented, several, such as *minimise*, *international*, and *codification*, have found a permanent place in the language.

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*The Law of Mortmain.* By THOMAS BOURCHIER-CHILCOTT.  
London: Stevens & Haynes. 1905.

The passing of the Mortmain and Charitable Uses Act 1891 very much simplified the law by rendering unimportant a number of cases on the subject of gifts "savouring of the realty." Its effect is well summed up in the first section of this book, entitled "Evolution of Mortmain," as follows:—"The effect of the provisions of the Mortmain and Charitable Uses Act 1891 has been what might be termed a complete reversal of the position of charitably disposed people as to their power to dispose of landed property to charitable purposes. Their power to alienate land by deed or will to such purposes is now practically unrestrained—except in the case of alienation by deed to corporate bodies—although in most cases the proceeds of sale of land devised alone can be retained by the charity. Where alienation is by deed the requirements of sect. 4 of the Mortmain and Charitable Uses Act 1888 have to be complied with." It is further pointed out that a licence to enable a corporation to hold land does not enable a donor to give property to it. A gift for *religious* purposes as distinct from *charitable* is still "void either as a 'superstitious use' or as tending to create a perpetuity." The work

is composed of the three Mortmain and Charitable Uses Acts, very fully annotated. In these notes a great deal of very useful information will be found. For instance, under sect. 8 of the Act of 1888 will be found a list of the Acts of Parliament in force authorising the acquisition of land in mortmain for objects more or less charitable. Under sect. 11 of the same Act, which enacts that the Act shall not extend to Scotland or Ireland, summaries are given of the law on this subject of Scotland, Ireland, Cape Colony, Australia, Canada, India, and several of the United States. We may also call attention to the classification of charities given under sect. 13.

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*Encyclopædia of Forms and Precedents*, Vol. VII: Inventions to Landlord and Tenant. Vol. VIII: Lands Clauses to Mortgages. Under the general Editorship of A. UNDERHILL, M.A., LL.D. London: Butterworth & Co. 1905.

Mr. Underhill and his colleagues are to be congratulated both on the despatch with which the different parts of this great work are issued and also the quality of the work produced. The preliminary notes are in most cases wonderful compilations of the law; a great number of useful and some out-of-the-way precedents are given, with many good footnotes. The most important subject treated in the seventh volume is Landlord and Tenant. For this Messrs. J. H. Redman, J. M. Lightwood, and Cecil Hartley are mainly responsible: but a collection of Sporting Forms of no little value is contributed by Messrs. J. Willis Bund and Horace Freeman. The preliminary note, which fills about 110 pages, explains the Authors' reasons for adopting the division in this collection of precedents of (1) executory agreements, and (2) leases, instead of the old division into agreements for leases and leases, and explains the distinction between leases and licences: and we notice that in spite of *Lowe v. Adams* they consider that *Wood v. Leadbitter* remains unshaken. They deal with agreements and then leases, and under Lessees' Covenants discuss fully the Covenant to pay rates, taxes, etc. After having gone through all the parts of the lease, they go on to leases by limited owners and persons under disability, and conclude with a careful examination of the special points for consideration involved in agricultural and sporting leases. The precedents of Agreements, Leases, Notices, etc., amount to 226, and cover a very wide range of subjects; including residential houses, chambers, lodgings, public-houses, mills and manufactories of various sorts, farms, sporting and

fishing rights, and cricket and recreation grounds. There are also a number of agreements relating to building contracts, that fertile source of litigation. Perhaps the most elaborate precedents are those concerned with public-houses, mills and manufactories, and farms in various counties. We are glad to notice that the interest of the tenant of a residential house is more looked after than is usual in books of precedents, and he is warned against the danger of the usual covenant to pay rates and taxes. On more than one occasion the difficulties caused to draftsmen by the Bills of Sale Acts is alluded to; as in cases of powers of distress for rent of furniture, or price of liquors supplied by a brewer. In a note on that subject the Authors explain why the former practice of inserting in brewers' leases an express power of distress for liquor supplied has been discontinued, and state that the reservation they have drawn has been done to evade the Bills of Sale Acts. They candidly confess, however, that "whether the object is accomplished has not yet been decided." We particularly notice a clause to enable the landlord of a public-house to concur in arrangements to surrender the licence. There are a number of leases of various sorts of mills, many of which are long and complicated. Other titles are Invention, Land Improvement, and Land Tax Redemption.

The eighth volume has no subject which overwhelms the rest of the volume as Landlord and Tenant has in the one before, but "Mortgages" takes up more than half of it and furnish 211 precedents. The greater part of it is by the General Editor and Mr. C. Hartley, but there are contributions by Messrs. Blagden, H. H. King, T. C. Wright, G. N. Marcy and others. We may call attention to one or two points, such as the difficulty the Registration Acts seem to put in the way of mortgaging. The General Editor, at the end of a long note, after referring to various suggested courses, says sadly, "It would seem on the whole that the Land Transfer Acts, which were intended to simplify conveyancing, have only succeeded in making it (so far as mortgages are concerned) more elaborate and technical than ever." We notice also a note by which timely warning is given "that trustees can only lawfully join in a contributory mortgage if expressly empowered to do so." There is a form "intended to enable the lender to take a share of the profits of a business without becoming liable to the creditors of the business as a partner," and to this there is appended a long note showing the difficulties of such a provision. There are some other important

titles, such as Mining Leases and Licences, by Messrs. J. H. Redman, J. M. Lightwood, and C. Hartley. Here, though there are only 28 precedents, yet so numerous are the provisions that have to be inserted in each, that they cover nearly 200 pages. Other important subjects dealt with are the Land and Railways Clauses Consolidation Acts, by Messrs. Sampson and Leach; and Local Authorities by Messrs. J. W. Baines, P. S. Gregory, A. C. B. Webb, and J. Scholefield.

*Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century.* By A. V. DICEY, K.C., B.C.L. London: Macmillan & Co. 1905.

Professor Dicey has written a book full of interest and food for thought. These lectures have been delivered at Oxford during the last five years, and are based on a course of lectures delivered to the Harvard Law School in 1898. The Preface explains the character of the book. "Even for the nineteenth century the book is not a history of English law; still less is it a history of English opinion. It is an attempt to follow out the connection or relation between a century of English legislation and successive currents of opinion. The book is, in fact, an endeavour to bring the growth of English laws, during a hundred years, into connection with the course of English thought." Professor Dicey divides the century into three periods. The first from 1800-30 is a period of Old Toryism or legislative quiescence, which is characterised as the age governed by the optimism of Blackstone and the reactionism of Eldon. But during all this period new ideas were fermenting beneath the surface, and when the passing of the Reform Bill transferred the legislative power into the hands of the middle classes, they were found to be strongly influenced by the principles of Benthamism, and the result is an outburst of legislative activity largely of a Benthamite trend. A most appreciative account of Bentham's genius is given. "The object of his life-long labours was to remodel the law of England in accordance with utilitarian principles." "In Bentham's intellect were united talents seldom found in combination, a jurist's capacity for the grasp of general principles, and the acumen of a natural born logician were blended with the resourcefulness of a mechanical inventor." It is interesting to note the reasons given for the acceptance of Benthamism. It exactly answered to the immediate wants of the day in advocating practical

reforms free from dogmatic revolutionary theories; and it "fell in with the habitual conservatism of Englishmen." "Legislative utilitarianism is nothing else than systematised individualism, and individualism has always found its natural home in England." The period of Benthamism or Individualism is put down as from 1825—1870. The trend of legislation under this influence is shortly in favour of "humanitarianism," extension of liberty, "and adequate protection of rights." These principles resulted in mitigation of the Criminal law, emancipation of slaves, Combination Acts, Companies Acts, Toleration Acts, and Acts for the reform of procedure. An interesting part of these lectures is where it is shown how the progress of Bentham's legislation was affected first by counter-currents and cross-currents, such as are evidenced by the Ecclesiastical legislation of the period, and the Judicial legislation, and to the end of its period by the increasing force of Collectivism. The history of the growth and influence of Collectivism, the debt it owes Benthamism, and the aid afforded to its development by the Tory attitude to factory legislation, and the High Church movement emphasizing the idea of the Church as an entity, is, we think, the most important part of the book. The increasing power of the movement, its legislative success, is evidenced by Workmen's Compensation Acts, the Combination Act 1875, Public Health Acts, Housing of Working Class Acts, etc. We quite agree with the learned Author that there is no sign of Collectivism getting any weaker. The claims put forward on behalf of Trades Unions for exceptional privileges, and even the Aliens Act show that Individualism is quite out of favour. The whole book is worth the most careful study, and we conclude by pointing out what in Professor Dicey's opinion are some important causes which have weakened the doctrine to which we believe he himself is attached. "The disintegration, then, of beliefs has weakened the authority of the Benthamite doctrine; the apotheosis of sentiment has rendered difficult the application of the utilitarian theory to the amendment of the law; the historical method has fostered a spirit foreign to the ideas of Benthamite philosophy."

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*The Law of Carriage by Railway.* By H. W. DISNEY. London: Stevens & Sons. 1905.

The Author explains in his Preface that this work is intended to serve as a handbook to "enable railway men to gain some knowledge of the law governing the ordinary relationship between the carrier



and his customer." It is founded on notes made by the Author for lectures at the London School of Economics and Political Science. Mr. Disney deals with his subject remarkably clearly, and divides it into two parts of about equal length. The first is concerned with the carriage of goods and, as is proper, begins with the "Common Carrier," his duties and liabilities. This naturally leads to the Carriers Act and the Railway and Canal Traffic Act 1854. The rest of this part deals with the subject in what may be called chronological order; and then come two chapters on the carriage of animals, and passengers' luggage. We notice in the last chapter that though reference is given to both *Becher v. G. E. Ry. Co.*, and *Meux v. G. E. Ry. Co.*, the two cases are not critically compared. The second part, which is headed "the carriage of persons," is mainly taken up with the law of negligence and cases illustrating it. We think here also for legal purposes it would have been useful to compare more clearly some of the difficult cases of passengers sustaining injury by alighting at stations badly lighted, or where the train had overshot the platform, as some of them are hard to reconcile. This was probably rather beyond the purpose of these lectures, which was to give a lucid explanation of the general principles of the law of carriage by railroad, which has been well done.

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*Corps de Droit Ottoman.* By GEORGE YOUNG, Second Secretary of the British Embassy at Madrid. 3 Vols., forming the first part. Oxford: The Clarendon Press. 1905.

The undertaking of Mr. George Young begun in these substantial volumes is an arduous one, especially for an Editor who in his own words is neither a jurist nor an Orientalist; but his diplomatic calling probably is as helpful to him as a professional knowledge of law would be, in making a compilation that requires rather the capacity for skilful collection than scientific reasearch. The object of this collection of Ottoman laws is to bring within reach of the most inexperienced, and to render of easy reference to the expert, the domestic legislation of the Ottoman Government. This is shown in the introduction to consist of the Statute law and the customary laws of the various races which make up that composite national structure, these forming a body of Civil law distinct from the religious law of Islam (corresponding to our Canon law), and the International law of the Capitulations and Conventions. With this

last only the foreign communities established in Turkey are concerned. The chief subject of these volumes is the Civil law, which deals with Commercial and Criminal law, and is in harmony with the principles of French law in so far as they are not opposed to the ordinances of the Canon law.

The first volume deals with administrative and judicial law, the law of succession and of immovable property. The second gives the law affecting privileged non-Moslem communities, Greek, Armenian, Protestant, Greco-Latin, Oriental, Latin, Israelite, and non-privileged communities, followed by personal laws as above mentioned, and the law of public order, and military service. The third volume deals with laws affecting the external relations of the Empire, its maritime law and its law of public health, and its law of foreign commerce, and there is an interesting chapter on treaties regarding the Turkish Straits, with a list (p. 55) of the foreign vessels of war which have passed the Dardanelles which, however, does not include the latest instances of this occurrence. The text of the book throughout is French, with a short English Preface; the sub-division of the several heads of law above indicated are clearly demarcated, and there is a table of contents at the beginning of the first volume, though this hardly supplies the absence of an Index.

**Second Edition.** *Law and Practice relating to the formation of Companies.* By VALE NICOLAS, assisted by W. F. LAWRENCE, M.A. London: Butterworth & Co. 1904.

The success of the first edition of this work has induced Mr. Nicolas to issue a second and considerably enlarged one. The recent cases of importance, such as *Baily v. British Equitable Assurance Co.*, and *In re Slobodinsky*, are added, and many subjects are more fully considered, with the result of the addition of something like 150 pages. Within the limits he has set himself the Author treats his subject fully, and no less than 160 pages are devoted to forms and precedents. The work is an undoubtedly good one, and possesses the excellent feature of giving the dates of all cases.

**Second Edition.** *A Digest for the Intermediate Examination of the Law Society.* By R. M. STEPHENSON, LL.B. London: Horace Cox. 1905.

The law necessary for this examination is, for the convenience of students, done into questions and answers, and, as far as we have

been able to examine it, seems carefully and correctly done. The increased size of this edition is due to the addition of Book IV of *Stephen's Commentaries* to the subjects of examination, coupled with the bulk of recent Statute law.

**Second Edition.** *Epitome of Personal Property Law.* By W. H. HASTINGS KELKE, M.A. London: Sweet & Maxwell. 1905.

About 20 out of something like 120 new cases will be found in this edition, and there are also four or five Statutes added, but we do not notice any material alterations or additions. It gives a good, though necessarily short epitome of a subject complicated by the necessary and intricate connection between property and contract.

**Third Edition.** *Law and Practice relating to Patents, Trade Marks and Designs.* By DAVID FULTON. London: Jordan & Sons. 1905.

The practice in Patent matters has been so altered by the passing of the Patent Act 1902, and the issue of the new Patent Rules of 1905, that Mr. Fulton no doubt felt compelled to bring out a new edition. This he has done very thoroughly. He has not only noted all the changes in the Law and Practice made by the new Act and Rules, but he has consolidated the Patent Rules from 1903—1905, the Trade Marks Rules 1890—1898, and the Designs Rules 1890—1898. In each case he has followed the convenient plan of giving the repealed rules in italics, and the substituted rules in heavier type. There are three appendixes. A. gives the International Convention for the protection of Industrial Property, 1883, as amended 1900. B. is a collection of useful precedents. C. codifies and consolidates the Patents, Designs and Trade Marks Acts 1883 to 1902. Each of the three subjects dealt with has a separate index and a separate table of cases. The table of cases gives, not only the date of each case cited, but also the matter the case deals with. The whole forms a very complete and valuable treatise comprising both law and practice.

**Fourth Edition.** *Hints as to Advising on Title.* By W. H. GOVER, LL.B. London: Sweet & Maxwell. 1905.

Several additions have been made to this excellent and very practical little book. Most of these are the result of the Land Transfer Act 1897 and the Rules under it. For instance, the changes in devolution on death, which that Act introduced, are

given. The chapter on Registered Title has been rewritten, and a chapter on Compulsory Registration added, containing a very useful table showing the dates when registration became compulsory in the various parishes and places of the County of London. Mr. Gover sees great difficulty in the way of contriving any scheme for evading the Land Transfer Act, and can only point out that by obtaining possession of the title deeds and lodging a caution the risk is minimised. Other additions refer to Foreclosure Orders and Friendly Societies.

**Fourth Edition.** *A General View of the Law of Property* By J. ANDREW STRAHAN, M.A., LL.B., assisted by J. SINCLAIR BAXTER, LL.B. London: Stevens & Sons. 1905.

Mr. Strahan differs from most, if not all, of those who have written on this subject before him. He does not divide his subject into real and personal property, but considers property as a whole, only pointing out differences for the purpose of contrast. It is a very wide subject, and difficult to compress into a volume of under 400 pages of text. However, a good arrangement and clear grasp of principles can do much, and that Mr. Strahan has achieved a well-deserved success is shown by the fact that the work has reached its fourth edition in less than ten years. It strikes us as an excellent book for students. The only alteration of importance is that the appendix dealing with conveyancing has been removed, and instead, there has been inserted one contributed by Professor Sinclair Baxter on Irish Land Purchase. The principal reason for the omission of the former appendix is that Mr. Strahan has treated the subject in more detail in another work.

**Fifth Edition.** *Taylor's Principles and Practice of Medical Jurisprudence.* By FRED. J. SMITH, M.A., M.D. London: J. & A. Churchill. 1905. 2 vols.

We have been long waiting for a new edition of this the oldest and best-known work on its subject. There are other valuable works on the subject, such as those by Dr. Poore and Dr. Tidy, but none in which so many subjects are so exhaustively considered. There are, as might be expected, considerable additions to the present edition, caused partly by the advance of medical science, and partly as the result of legislation throwing new responsibilities on medical men. One instance of this is to be found in the effect

of the Workmen's Compensation Acts, which have compelled medical men to turn their attention to the important, but not always easy question, "What is an Accident?" A large number of new cases will be found, and some are of especial importance to the medical profession itself. These are the recent cases, where actions have been brought against doctors for negligence, and they will be found in the chapter entitled "Malpraxis." A very important addition which has been made to the chapter treating on the tests for blood, is a description of what are called the "physiological tests." The second of these, *i. e.*, the *precipitin* test, is still on its trial, "but it seems to offer the very greatest of possibilities for the settlement of the all-important question 'Is this human blood?'" The recent cases on the law of abortion are given, and also a case submitted to counsel by the Royal College of Physicians, which Dr. Smith has headed "Professional Secrecy in Cases of Abortion," and which will well repay perusal. Among other important additions we also notice an almost verbatim report of the trial of Klosowski or Chapman for antimonial poisoning. The part dealing with poisons has been enlarged by the addition of several more drugs, such as *phenacetin*, *antipyrin* and *trional*, and reference is made to the valuable report of the Royal Commission on Arsenic Poisoning, which "should be in the hands of every analytic chemist who may be concerned in a case." An interesting addition is a chapter by Dr. W. J. Buchanan on Medical Jurisprudence in India, where will be found some interesting notes on, among other subjects, "Rupture of the Spleen" and "Poisoning." The arrangement of subjects has been a good deal altered, a good many woodcuts omitted, and a valuable bibliography added. We would like to call attention to the criticisms on the system of Coroners' Inquests, and on the new scale of allowances to medical witnesses.

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**Fifth Edition.** *Kerr on Receivers.* By W. DONALDSON RAWLINS, K.C., M.A. London: Sweet & Maxwell. 1905.

The most noteworthy feature of this edition is the addition of a chapter on the "Appointment of a Receiver out of Court." Considering the large amount of property for which Receivers may have to be appointed under mortgage deeds, debentures, etc., we think it very desirable that the subject should be treated in a work dealing with Receivers, and we think the new chapter adds considerably to the practical value of the work. *Kerr on Receivers* is a work

on an important subject, and in the skilful hands of the learned Editor it has been decidedly improved by the "pruning and trimming" which it has undergone.

**Seventh Edition.** *Lindley on Partnership.* By the Hon. W. B. LINDLEY and T. J. C. TOMLIN, M.A., B.C.L. London: Sweet & Maxwell. 1905.

This is the first edition of this well-known work, in the preparation of which Lord Lindley has taken no part. The present Editors are solely responsible for it. The early editions included the law of Companies as far as it was connected with the law of Partnership, but in 1888 the treatise was divided into two parts; one dealing with the law of Partnership proper, the other with the law of Companies. Another edition was published of the first of these after the passing of the Partnership Act 1890, and now some twelve years later we have the present volume. The learned Editors have not been obliged to refer to many new and important statutes, but references will be found to the Money Lenders Act 1900 and others. Numerous new cases will be found, the most important of which is undoubtedly *Trego v. Hunt*, the decision in which must have caused the Editors to revise their text in several places. We notice it is referred to no less than eight times. Another important decision is *Gosling v. Gaskell*, which finally established "the doctrine that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*, or unless they are his agents." This modification of the harsh old rule that all persons who shared the profits of a business incurred the liabilities of partners therein, must have given sincere satisfaction to the learned Author, who, as long ago as the first edition in 1860, "expressed a hope that the rule in question would ere long cease to exist," and characterised it as "arbitrary, unjust, and as productive of the greatest confusion." We do not know if actions of account between bookmakers are of common occurrence, but a rather curious effect of the Gaming Acts is pointed out, which results from the fact "that while a betting agent can be compelled to pay over to his principal winnings he has received, he cannot recover from this principal losses he has paid." The consequence is "that if on taking the accounts money is found to be due from one partner in respect of winnings which he has received, his co-partner can

make him account for such winnings, but if money is found to be due to him for losses which he has paid, he cannot recover any part of such losses from his co-partner." We are very glad to renew our acquaintance with the "Highwayman" case, which the Editors have done well to retain. Mr. J. Campbell Lorimer, LL.B., K.C., contributes some important notes on the Scots Law of Partnership, with reference to the Partnership Act, 1890, which cover 40 pages, and will be found in Appendix I.

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**Eighth Edition.** *Summerhays and Toogood's Precedents of Bills of Costs.* By T. C. SUMMERHAYS and C. GILBERT BARBER. London: Butterworth & Co. 1905.

Considerable alterations have been made in the present Edition. These have been rendered necessary by the publication of new sets of Rules and Scales, and the changes caused by the fusion of the Taxing Departments of the Chancery and King's Bench Divisions. The Editors have also taken this opportunity of considerably altering the plan of the work and enlarging it. All the rules and scales are given, a very large number of precedents of bills of costs dealing with proceedings in the House of Lords; the Privy Council; Court of Appeal; High Court of Justice; Mayor's Court and County Courts. Besides these there are precedents for Bills of Costs in Conveyancing, Probate and Administration, and in passing Estate Duty, Residuary and Succession Accounts. The value of these carefully drawn precedents can be seen at a glance. It is rather curious that there should be no authorised scale of allowances to witnesses, and that the only guide in existence is that of Hilary Term, 1853.

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**Fifteenth Edition.** *Pratt and Mackenzie's Law of Highways.* By W. W. MACKENZIE, M.A. London: Butterworth & Co. 1905.

The law of Highways is one of great importance, considerable difficulty, and the subject of endless disputes. There are nearly 120,000 miles of highways in England and Wales repairable by highway authorities, and although owing to the period of postponement allowed under the Local Government Act 1894 having elapsed, the highway area has become well defined; yet the inhabitants of parishes are still in some circumstances liable, and main roads and bridges are in most cases under the control of the County Council. Under such complicated circumstances a new edition of

this well-known work will be welcome. It is divided as before into two parts; the first dealing with the law of Highways independent of Statute; the second with the Statutes. The principal Statutes passed since the last edition are the Locomotive Act 1898 and the Motor Car Act 1903. Both of these are given in full, with Bye-laws and General Orders. In the eight years which have elapsed since the last edition a number of important cases have been decided, such as those under sect. 12 of the Locomotive Act 1898, amending sect. 23 of the Highways and Locomotives (Amendment) Act 1878, which relates to proceedings for extraordinary traffic damages, and the large number of cases dealing with the liability of the recently created Public Bodies, such as County Councils, District Councils, etc. *Pratt on Highways* is constantly referred to in all other books which deal directly or indirectly with Highways: for instance, we find many references to it in the last edition of Archbold, and under the present editorship it seems likely to keep its place as the authority on the subject.

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**Twenty-third Edition.** *Archbold's Pleading, Evidence, and Practice in Criminal Cases.* By W. FEILDEN CRAIES, M.A., and GUY STEPHENSON, M.A. London: Sweet & Maxwell. 1905.

We are very glad, for more than one reason, to see a new edition of this work. Though there have not been many new Statutes affecting the Criminal law, yet it is convenient to have them included in a work so constantly referred to; and a considerable number of important cases have been decided since 1900, the date of the last edition. Another reason is that, in spite of all the care of the very competent Editors, a considerable number of errors had crept in which seriously affected the accuracy of the work. We are glad to find, from what examination we have been able to make, that most of these have been corrected. The new Statutes added in full are the Larceny Act 1901; the Prevention of Cruelty to Children Act 1904; the Poor Prisoners' Defence Act 1903, with the Attorney-General's rules and scales of costs; sections of the Money Lenders Act 1900, and of the Companies Act 1900. The new scales of costs and allowances of June 1904 are given, and in consequence the chapter on Costs has had to be largely rewritten. The paragraphs on *Autrefois Acquit* and *Autrefois Convict* have been rewritten, which is a decided improvement. The reference in the index to *Autrefois, Convict* should be 174—177 instead of 147—177. A subject that



seemed to have become almost obsolete, that of Treason, has had new light thrown on it in consequence of the case of *R. v. Lynch*; the cases of *R. v. Tibbits and Windust*, *R. v. Gray*, and *R. v. Parke*, have induced the learned Editors to rewrite the Title "Libels reflecting on the Administration of Justice," and add to it "Contempt of Court." The chapters on "Compensation," "Restitution," and "Compounding Offences," have been remodelled. It will be noticed under the last head that the Editors do not agree with the recent decision of the Recorder of London in *R. v. Stockwell*. It is curious to note how the title of "Lotteries" has had to be expanded in consequence of recent "competitions." The proper direction to the jury where death has resulted from an illegal operation is very properly stated to be the cause of "considerable divergence of opinion among the Judges," but there seems to be a growing inclination to treat it as a case of manslaughter, not murder. A new feature of the work is the citation of Colonial, and, in some instances, of American authorities, as in the note to *Macnaughton's Case*.

On every page can be found evidence of the care and labour which the Editors have devoted to making their book as complete as possible, but they have not succeeded in correcting quite all the misprints in the last edition. For instance, on page 571, line 8, some words such as "but may" should be inserted between the words "larceny" and "be convicted." Again, on page 767, in the last line of sect. 103 of the Land Transfer Act 1875, it should read "such person" instead of "each person." On page 1322 in sect. 2 of the Inebriates Act 1898, the word "inebriate" is left out between the words "certified" and "reformatory." These slips are not very important, but on page 765 we notice one that is so. It is there stated that to engrave or possess plates for forging share warrants, etc., is punishable by penal servitude for life or not less than three years, whereas on referring to the Statute cited, 30 & 31 Vict., c. 231, s. 36, it will be found that the maximum punishment for that offence is fourteen years' penal servitude. And this mistake is repeated in the next four offences given, where the words "same punishment" or "like punishment" occur. Again, on page 763, sect. 184 of the Merchant Shipping Act 1894 is wrongly cited for dealing with the offence of forging documents for the purpose of obtaining property of deceased seamen, instead of sect. 180, and the punishment prescribed by sect. 695 (3) for falsely certifying documents, namely, eighteen months' imprisonment, is omitted.

## CONTEMPORARY FOREIGN LITERATURE.

*I Presupposti Filosofici della Nozione del Diritto.* By Professor GIORGIO DEL VECCHIO. Bologna, 1905.

The necessity of logical definition of law, as distinguished from empiricism, is the main point of the book. Following Plato (*Rep.* v, 22), the learned author implies that only by this process can true knowledge and not fluctuating opinion be attained. The *Allgemeine Rechtslehre* school, analogous to the English analytical school, has failed because it has not sufficiently recognised the logical basis of law. It has been too much limited by time and space. The conclusion of the learned author does not perhaps help an English lawyer much. It is to this effect (p. 154), "Law is not law except by the ideal form which determines it; and nothing can be known as law except in relation to such form."

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## PERIODICALS.

*Journal du Droit International Privé*, 1905. Nos. V, VI. Paris.

M. Glasson has an interesting article on the condition of foreigners in France. Among the decisions reported is one of *Delcroix v. Hamaide*, in which the question of marriage brokerage contracts was raised before the Brussels Court of Cassation. It was argued that such contracts fell within the ordinary law of *courtage*. But the Court held that the disposition of one's whole future life had nothing in common with the disposition of part of one's property.

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*Zeitschrift für Internationales Privat-und Öffentliches Recht.* 1905. Vol. XV. Leipsic.

This magazine contains lengthy articles on the Hague Divorce Convention and on the Hungarian Consular Courts. Numerous German and Austrian decisions are reported. There are reviews of many books, including Dr. Schirrmester's *Das bürgerliche Recht Englands*, recently noticed in these columns.

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*Deutsche Juristen-Zeitung.* 1905: 15 July—1 Oct. Berlin.

At p. 829 is a discussion of the liability of innkeepers for the loss of the property of guests. The German code seems less favourable to the former than English law. At p. 873 Professor Niemeyer estimates the effect of the Peace of Portsmouth on international relations.

*La Giustizia Penale.* 1965: 29 June—21 Sept. Rome.

Among interesting decisions may be mentioned those at pp. 1015 and 1179. In the former it was held that it was both private violence and an attack on freedom of labour to force any one by threats to join in a strike on a railway. In the latter the Court of Appeal at Catanzaro held that perjury is none the less perjury, though the evidence given had no effect on the judgment of the Court. The fact that it was so is only ground for mitigation of punishment. A curious point occurs at p. 1387. A member of a religious order may appear as *parte civile* in a prosecution for the homicide of another member of the order. There are several decisions, impossible in England, on the construction of ordinances dealing with the State monopoly of the sale of tobacco, salt, and matches.

• JAMES WILLIAMS.

Books received, reviews of which have been held over owing to pressure on space:—Atkinson, *Solicitors' Liens and Charging Orders*; Kuhn, *International Civil and Commercial Law*; Strahan and Kenrick, *Digest of Equity*; Underhill and Pease, *Summary of the Law of Torts*; Maxwell on *Interpretation of Statutes*; Palmer, *Company Law*; Roscoe, *English Prize Cases*; Todd, *Treatise on Belgian Law*; Pike, *Year Books, Edw. III, 18 & 19*; Faulds, *Guide to Finger-print Identification*; Smith & Sibley, *International Law during the Russo-Japanese War*; Elgood, *Law of Executors and Administration*; Ashworth, *English Constitutional History*; Slater, *Law of Arbitration*; Thwaites, *Students' Guide to Constitutional Law and Legal History*; Snowden's *Magistrates' Assistant*; Westlake, *Private International Law*; Macqueen's *Law of Husband and Wife*; Clark, *Students' Conveyancing Precedents*; Buchan, *Taxation of Foreign Income*; Rigg, *Calendar of Plea Rolls of Exchequer of the Jews*; Carr, *Law of Corporations*; Haines, *Restrictive Railway Legislation*; *Encyclopedia of Local Government Law, Vol. I*; *English Reports to Vol. 56*; Hall, *The Law and Practice in Divorce and Matrimonial Cases*; Wolstenholme's *Conveyancing and Settled Land Acts*.

Other publications received:—*Jamaica Law Reports*; *Social Problems of the Bar*. By J. Pergament (Funk & Wagnall); Hildebrand, *The Union between Sweden and Norway*; *Report of the American Bar Association, Vol. 27*; *General Index to Law Times Reports* (Horace Cox); *The Ceylon Law Review*.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Judicial Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer (India)*, *South African Law Journal*.

# THE LAW MAGAZINE AND REVIEW.

NO. CCCXXXV.—FEBRUARY, 1905.

## I.—LAND TENURE IN THE ISLE OF MAN.

IN an article in the February number<sup>1</sup> of this magazine, 1902, on the Legislature and Judicature of the Isle of Man, the present writer briefly described the constitution of that ancient though petty sovereignty, as well as the system of jurisprudence by which its affairs are regulated. It was not possible on that occasion, without exceeding the legitimate limits of a magazine article, to touch upon the subject of land tenure in the Island. Although many of the features which characterise the law of real property in the Island find their counterpart in the copyhold of English manors, there are numerous others so distinctly unique in their origin and historical development as to merit the notice of those interested in this branch of learning. In perusing these pages, it must be remembered that the Isle of Man is a little kingdom governed by a Legislature of its own, competent to make laws upon the various subjects pertaining to the well-being of its people; all of which is fully explained in the article referred to. When an Englishman speaks of the Act of Settlement he has in mind the famous Statute 12 & 13 William III, c. 3, settling the succession to the throne of his country. When a Manxman speaks of the Act of Settlement his meaning is very different. His

<sup>1</sup> *L. M. & R.*, Vol. XXVII, No. 323.

thoughts are nearer home, and circle round that memorable epoch in his country's history, 1704, when the Insular Legislature passed the famous, and to him all important statute, "for the perfect settling and confirmation of the " estates, tenures, fines, rights, suits and services of the " tenants of the Right Honourable James Earl of Derby " within his Isle of Man."<sup>1</sup> The importance of this Act to the Lord's tenants is very obvious, inasmuch as it expressly conferred upon the latter estates in fee simple in quantity, though not in quality, in their several tenements. Prior to the passing of this Act, the position of the tenants was probably the same as that of copyholders in England, or tenants at will, but according to the custom of the manor and subject to the rents, fines, and other customary manorial burdens.

Leases from the Lord for terms of years were common in very early times in the Isle of Man, but notwithstanding the nominally limited duration of the tenant's interest, the manorial books of the Lord clearly show that the leases were perpetually renewed, descending in this way from ancestor to heir until they gradually developed into fee simple estates, and the form of holding by lease disappeared. About the year 1643 the Lord of the Island re-introduced the system of leases. Although a double rent was imposed upon the tenants, they were accorded a corresponding relief by the removal of many heavy burdens, such as the delivery of a beef annually to the Lord's Castle, and the Lord's right of pre-emption, or being victualled at a certain low price. The new leases were doubtless popular for a time, and were frequently sought for by the tenants as a privilege. It was evidently not considered that the permanency of the holdings was impaired by this new arrangement, a fact evidenced by an Act of Tynwald passed

<sup>1</sup> See Statutes of the Isle of Man (Revised edition), Vol I, p. 161. *Note.*—

\* The above-named statutes are hereinafter referred to as "statutes."

in 1662 (to which frequent reference has yet to be made), in which descendibility from ancestor to heir is distinctly recognised.

The practice of leasing at length became universal, the estates of the tenants, nevertheless, continuing to descend from ancestor to heir according to the ancient custom of the manor.

Succeeding Lords, it has been said, disputed the permanency of the holding. Whether this be so or not, it is certain that the fear that the Lord might some day take advantage of the terminable form of the lease, and re-enter upon its expiration, gradually spread amongst the people, causing widespread uneasiness, which ultimately threatened to break out into open rebellion.

Earl James II, the sovereign of the Island and Lord of the Manor, moved by the serious disaffection brewing in his little kingdom, and influenced also largely, it is said, by the exhortations of that illustrious and powerful prelate, Bishop Wilson, who then occupied the see of Sodor and Man, determined upon a policy of conciliation. Hence the Act of Settlement which fixed for all time<sup>1</sup> the fines to be payable by the tenants upon death or alienation, and provided that they should "continue for ever hereafter at a fixed and certain fine upon every descent and alienation." Thus an end was made of all possibility of unfair exactions on the part of the Lord or his successors, whilst, at the same time, the Act invested the tenants with an estate of inheritance in their holdings descendible from ancestor to heir. The precise words of the Act of Settlement are<sup>2</sup> "good and perfect estates of inheritance descendible from ancestor to heir according to the laws and customs of the said Isle." The tenants' holdings, now expressly enlarged into estates of inheritance with a statutory title, were at the

<sup>1</sup> See Act of Settlement, sect. 2 ; Statutes, Vol. I, p. 162.

<sup>2</sup> See Act of Settlement, sect. 14 ; Statutes, Vol. I, p. 167.

same time rendered alienable by acts *inter vivos* at the absolute discretion of the tenant, free from interference on the part of the Lord. This power of disposition, the Act provided, might be made "by gift, grant, assignment, or any, "other deed or contract whatsoever."<sup>1</sup> The Act did not effect an enfranchisement of the copyhold estates, as the seignorial rights remained to the Lord, although reduced to a certainty, and the Act expressly reserved to him the mines and quarries of the manor. This famous Act affords an early instance of the three F.'s embodied in a statute, Fair rent, Fixity of tenure, and Free sale. The enlightened policy of the Earl and the Bishop at this critical juncture in Manx history may well be said to be the foundation stone of the Island's prosperity, and to account largely for that spirit of loyalty and contentment so distinctly characteristic of its people. The Act did not apply to all lands in the Island, but only to those of which the Earl of Derby was the immediate Lord, including the lands known as the Lord's lands and those forming the Abbey lands. These constituted the great bulk of the lands of the Island, the remainder consisting of the Bishop's Barony and a few other small baronies of which the Earl was not the immediate Lord. The material advantage which the tenants secured by the Act, cannot be better told than in the language of Sir Spencer Walpole, the famous historian, who for eleven years was Governor of the Island. Writing in the year 1893, he says, "What the boon was may be "partly understood by figures. The rateable value of the "Island outside the towns amounts now to about £180,000 "a-year. Excluding mines, buildings, and other properties, "the purely agricultural rental may perhaps be placed at "£100,000. The Lord's rent,—in other words, the rent "secured to the Lord under the Act of Settlement,—does "not reach £1,500. The whole of this difference, that

<sup>1</sup> Act of Settlement, sect. 5; Statutes, Vol. I, p. 163.

“ unearned increment which the landlord almost every-  
 “ where appropriates, has remained with the tenants under  
 “ the provisions of this great measure.”<sup>1</sup> This description  
 of the Island’s Magna Charta is prefaced by the remark—  
 “ Such a piece of Legislation was perhaps never accom-  
 “ plished in any other nation in the world.”<sup>1</sup> Anciently, the  
 tenure by which the tenants of the Island held their lands  
 was called “ The Tenure of the Straw.” Parr, at one time  
 Deemster<sup>2</sup> of the Island, a man much reputed for his legal  
 erudition, some time prior to the year 1700, describes this  
 peculiar tenure as follows:—“ It is to be noticed that the  
 “ reason the said tenure was called the Tenure of the Straw  
 “ was because any tenant who had ceased (*sic*) and sur-  
 “ rendered his lands into the Lord’s hands or had alienated  
 “ the same to any other person, had to come into the Court  
 “ and make resignation thereof by delivery of a straw and  
 “ thereupon a record was to be entered of the same which  
 “ was all the assurance the succeeding tenant had of the said  
 “ estate in nature of a copyhold which was held sufficient  
 “ evidence of his holding without any writing script.” We  
 find a similar method of surrender in the case of English  
 copyholds varying as to the symbol used according to the  
 custom of the manor.<sup>3</sup> The tenant’s assurance was clearly  
 merely a copy of Court roll constituting him thus in all  
 respects a copyholder. The Act of Settlement, whilst en-  
 forcing the obligation of entry in the Court roll as formerly,<sup>4</sup>  
 and imposing a fine of £3 for failure in this respect, does not  
 expressly make the tenant’s holding conditional upon his  
 being entered and discharging the various duties incumbent  
 upon him in respect of his estate, and it will be recollected  
 that by section 5 of the Act a “ gift, grant, assignment, or

<sup>1</sup> *The Land of Home Rule*, by Spencer Walpole, p. 199.

<sup>2</sup> As to the office of Deemster, see the writer’s article in this Magazine of February 1902.

<sup>3</sup> 1 Watk., cop. 79.

<sup>4</sup> Act of Settlement, Section 11.



“any other deed or contract whatsoever” is to be esteemed and accounted as an alienation. The Act of Settlement first conferred upon the tenant the absolute right of alienation. An ordinance made by the Deputy Governor and Council in the year 1582<sup>1</sup> which, although not of the force of a statute, may well be taken to be declaratory of the Common law, prohibited under a penalty any alienation without the licence of the Lord or his council. Again, in the year 1645, by a statute passed in due form by the Insular Legislature, “All manner of gifts, grants, or assignments” made without the Lord’s licence were declared to be “utterly void and of no effect,” and even such assignments as were permitted were only to be allowed “in case of poverty or for or upon some other just cause or reason.”<sup>2</sup> The Lords of the Island who succeeded the grantor of the Act of Settlement showed no disposition to acquiesce in the loss of their veto upon alienations. Notwithstanding the unmistakable language of the Act of Settlement the old claim was revived and persevered in. The tenants, whilst not admitting the validity of the claim, appear to have submitted in practice to the ancient custom of confirmation by the Lord which consequently survived to modern days. The matter was finally set at rest in the year 1857, after the revestment of the rights of the Lord in the Crown, by the decision of the Judicial Committee of the Privy Council in the case of *Boardman and Avinson v. Quayle* (11 Moore’s P. C. Reports, p. 223). This Judgment declared that on the Act of Settlement coming into operation, the Act of 1645, so far as it rendered the consent of the Lord necessary to alienation, could no longer be in force.

Anciently, deeds were not used in the Island for the conveyance of lands, the change of ownership being effected, as described, simply by an entry in the Lord’s books following the delivery of the straw by the grantor. As this ceremony,

<sup>1</sup> Statutes, Vol. I, p. 58.

<sup>2</sup> Statutes, Vol. I, p. 100.

however, could only be solemnized at the half-yearly manorial Court, it followed that when transactions in land became more frequent much inconvenience was caused to vendors and purchasers by the delay in completion of their contracts: hence arose the custom of conveying by means of a simple deed of grant, followed by an entry in the Manorial Roll, a system which ultimately became universal, superseding entirely the ancient method of "delivery of the straw." There is no statute law in the Island analogous to the Statute of Frauds, 29 Car. II, c. 3, or to 8 & 9 Vict., c. 106, the Act of Settlement and the customary mode of transferring land, as before described, being the only guides for determining the mode by which an interest in land may be legally transferred. In practice it is considered that no interest in land of more than one year's duration in possession can be created without a deed. This assumption has been recognized by the Insular Courts and in practice has been universally acted upon for a long period of years. Whence it sprang and what authority can be vouched for its existence would be difficult to discover.

The lands of the Island are at the present day, and appear to have been from time immemorial, divided into four classes, each possessing distinct peculiarities of tenure, affecting the devolution of the class and involving other legal consequences. These are—

- I. Farm Lands or Quarterlands. (The latter term being more commonly employed.)
- II. Mills.
- III. Cottages.
- IV. Intacks.

As there were four distinct species of tenure, so also there were four separate methods of acquiring land, and the incidents of ownership varied in a certain measure according

to the mode of acquisition. These four methods may be classified as follows:—

1. Title by inheritance or descent properly so called.
2. Title by *bargaine-eirey* or settlement by an ancestor upon his heir apparent or presumptive, which was regarded as a species of descent.
3. Title by devise, gift, or voluntary settlement upon a person not standing in the relation of heir apparent or presumptive.
4. Title by purchase for value.

Lands acquired by the latter method were generally described simply as purchased lands. “Purchased” in this connection did not mean merely acquisition otherwise than by act of law. This meaning of the term is also well understood, and is equally important as in England, but the expression has in addition a secondary meaning, which to the non-legal mind is the primary one, namely that of being bought for a valuable consideration. To avoid confusion we shall sometimes say “bought lands” when purchase for value is intended.

The quarterlands comprised the best arable lands of the Island. They have existed in their present number, but with trifling changes of boundaries, from time immemorial.<sup>1</sup> By the Common law of the Island, lands were not necessarily descendible from ancestor to heir or otherwise regarded as real estate. Bought lands were down to the year 1662 regarded as chattels, and on the death of their owner vested in his personal representative for administration and distribution as part of his personal estate.<sup>2</sup> In that year an Act of Tynwald was passed, providing that bought quarterlands should descend to the heir, subject nevertheless to a charge equivalent in amount to the

<sup>1</sup> Sherwood, *Manx Law Tenures*, p. 19.

<sup>2</sup> Statutes, Vol. I, p. 114.

purchase-money, for the benefit of the next-of-kin. The lands of the intack cottage and mills class were untouched by the Statute of 1662, and so we find that the Act of Settlement, when enacting that estates shall be descendible, expressly excepts such as are reputed as chattels.<sup>1</sup> An Act of Tynwald passed in 1777<sup>2</sup> conferred the quality of heritability upon all bought lands, mentioning by name the several classes, and including even quarterlands which had ceased to be chattels for more than 100 years by virtue of the Act of 1662. The words of the Act of 1777 are, "And be it enacted by the authority aforesaid, that no houses, lands, or premises, either quarterlands, mills, cottages or intacks, purchased or acquired, shall be construed, deemed, or taken to be personal effects or chattels, so as to be considered as assets in the hands of executors, or subject to be claimed by right of Consanguinity, or next of kindred, in exclusion of the heir at law, any law, custom, or usage, to the contrary notwithstanding." The inclusion of bought quarterlands in this enactment was construed by the Insular Courts as extinguishing the lien for the purchase-money in favour of the next-of-kin imposed by the Act of 1662.

The mills and cottage lands constituted but an insignificant part of the total area of the Island. They were small plots of ground granted by the Lord for the purposes which their description sufficiently indicates.

The intacks, however, require a more detailed notice. These consisted of parcels of the forest, or common or other waste lands of the Lord, from time to time enclosed by virtue of a licence from the Lord or his governor. They were sub-divided into two classes, viz., intacks of ease and detached intacks, the former being distinguished from the latter by reason of their being attached to some quarter-

<sup>1</sup> Act of Settlement, Section 14 ; Statutes, Vol. I, p. 167.

<sup>2</sup> Statutes, Vol. I, p. 333.

land. Even prior to the Act of 1777 these, if acquired, along with the quarterland to which they were attached, by inheritance, devise or settlement, or otherwise than by purchase for value or licence to enclose, descended together with the quarterland to the heir-at-law.<sup>1</sup> The detached intacks had very peculiar characteristics. Prior to 1777, in the hands of the first encloser, they were simply chattels, and, upon his death, devolved as such, in the same manner as bought quarterlands, but whilst in the case of bought quarterlands, any devolution other than a sale for value transformed them into realty, such a result was only accomplished in the case of a newly-enclosed detached intack through the lengthy process of what was commonly called "three descents." The term descent is in this connection obviously inappropriate, as there could, strictly speaking, be no descent until the property of descendibility had been acquired. What was really meant was, that three successive devolutions must have occurred of such a character as to defeat the distribution of the land as personalty.

The devisability of lands in the Isle of Man has a history peculiarly its own. In England, with regard to freeholds, whatever may have been the power of testamentary disposition antecedent to the conquest, at any rate after the introduction of feudal tenures no estate greater than for a term of years could be devised by will except in Kent, and in some ancient boroughs, and in certain manors where the old Saxon privileges were suffered to continue. By the Statute of Wills (32 Hen. VIII, c. 1) all lands of socage tenure were rendered devisable by will, and under the provisions of the 12 Car. II, c. 24, all sorts of tenures, excepting only those in frankalmoign, copyholds, and the honorary services of grand serjeantry, were reduced to socage tenure. Copyholds, not being within the Statute of Henry VIII, could not be directly devised, unless, at any

<sup>1</sup> See Sherwood, *Manx Law Tenures*, p. 104.

rate, sanctioned by the particular custom of the manor,<sup>1</sup> but the same object could be effected by a surrender on the part of the intending devisor to the use of his will, which upon his death entitled the person designated in the will as devisee to be entered. This method of testamentary disposition appears to have been unknown in the Isle of Man. The devisability of bought lands in the Island does not rest upon a statutory basis. Being by the Common law regarded merely as chattels they could be disposed of by will as other personal estate; and the Act of 1662, in rendering bought quarterlands heritable, expressly preserved their devisability, providing "that if the deceedant make a will "thereof it to be observed."<sup>2</sup> Again, in the Statute of 1777, which provided that bought lands of the tenure of mills, cottages, or intack, should no longer be deemed to be personal chattels, there is a section expressly preserving their devisability.<sup>3</sup> It is interesting to note that this power of disposition was capable of exercise by a nuncupative will. The Statute of 1662 so often referred to enacts that "if "his (the owner's) real intention touching the disposing or "bequeathing of such bought grounds be apparent, and "lawfully proved by sufficient witnesses, and he or she die "intestate, that intention nevertheless to be observed, "according to the judicious consideration of the Court."

It was not until the passing of the Wills Act 1869<sup>4</sup> that all lands became devisable by will, so that the validity of a will of prior date, so far as concerns its operation upon real estate, depends upon the mode by which the would-be devisor acquired the property. Although time will gradually render this distinction of less and less importance, as yet the change in the law is sufficiently recent to require the careful attention of conveyancers. It was only those lands which were anciently regarded as chattels which were devisable by will before the Act of 1869, and it was no easy matter

<sup>1</sup> *Scriven on Copyhold*. 7th Edition, p. 147.

<sup>2</sup> Statutes, Vol. I, p. 114.

<sup>3</sup> *Ibid.*, p. 333.

<sup>4</sup> *Ibid.*, Vol. III, p. 465.

always to determine the class to which particular property belonged. It did not follow necessarily from the passing of some pecuniary consideration that the lands could be safely classed as bought lands. In the case of *Brew v. Brew*<sup>1</sup> the consideration for the grant of the land was, in addition to natural love and affection, £1,000 and a lien of £50 a-year for life to the grantor, notwithstanding which the transaction was determined to be a *bargaine-eirey* and not a purchase for value.

The liability of real estate for the debts of the owner depended in some degree upon the class to which the land belonged. The Real Property Act 1869 enacts that "all lands shall be liable to be taken in execution for "payment of debts." Prior to this, lands acquired by inheritance or *bargaine-eirey* could not be taken in execution for debt, and were not liable in the hands of the heir-at-law for debts either by specialty or simple contract, unless secured by mortgage, or unless the owner had in his lifetime been adjudicated bankrupt.<sup>2</sup> A very feeble and inadequate remedy for a creditor against a debtor whose wealth consisted of land was an order of sequestration. By this means the creditor secured two-third parts of the net rents, issues, and profits of the land towards payment of his debt; the coroner, the officer who enforces judgments in the Isle of Man, being ordered to seize and hold possession of the land until the debt should be discharged. This machinery for getting at the land of a debtor was evidently resorted to at an early date, and that with such frequency as to invoke the displeasure of a Legislature always kindly disposed towards landed interests. By a statute passed in the year 1737 it was prohibited to "any Court or Magistrate within the said Isle, but in

<sup>1</sup> Reported in *The Advocates' Note Book* published in 1847 by J. C. Bluett, a member of the English as well as of the Manx Bar.

<sup>2</sup> Sherwood's *Manx Law Tenures*, p. 96.

"extraordinary cases," to lay a sequestration upon the profits of lands, and even then it was not to be done "without the consent of the Governor, officers, Deemsters and Keys of the said Isle, any custom or practice to the contrary notwithstanding."<sup>1</sup> The authorities mentioned embraced the various elements constituting the Legislature of the Island, the Lord, who was Sovereign, alone excepted. A creditor whose debt might be small was likely to hesitate before putting in motion machinery so cumbrous, especially, in face of the risk that a body, composed almost exclusively of landlords, might not deem his case sufficiently "extraordinary" within the meaning of the Act to justify the profanation of rendering so sacred a possession as real estate available for payment of the just debts of its proprietor. Even if the applicant were fortunate enough to secure his order of sequestration, the remedy was a singularly precarious one, inasmuch as it applied only to lands in possession, and remained operative no longer than the life of the judgment debtor, the property passing to the heir free from all liabilities of the ancestor. In this condition the law remained for nearly another century before the Legislature felt called upon again to intervene.\* The Statute of 1820<sup>2</sup> clearly shows with what jealousy the Legislature still regarded any attempt to interfere with a landowner's privilege. The statute contains a provision authorising the release of debtors imprisoned under an order made upon a return of *nulla bona* to answer a judgment and execution. The discharge, it was provided, should only be granted upon certain conditions, one of them being that in case the debtor was "possessed of or entitled unto any lands of inheritance" not liable to be sold for the payment of his or her debts," he should grant a mortgage secured thereon for the benefit of all judgment creditors. The advantage to the creditor of

<sup>1</sup> Statutes, Vol. I, p. 220.

<sup>2</sup> *Ibid.*, p. 415.



this measure of relief depended obviously upon whether the debtor loved more dearly his liberty or his heir, as provided he elected to remain in jail until death released him, the creditor was no better off, and the lands descended to the heir undiminished by the prodigality of the imprisoned ancestor. The Bankruptcy Act of 1852<sup>1</sup> made lands of the kind in question assets for distribution amongst the debtor's creditors, but they remained until 1869, as already mentioned, immune from liability under execution, except by the cumbrous method of sequestration, and exempt in the hands of the heir from the ancestor's debts. So much, then, for lands acquired by inheritance or *bargaine-eirey* with respect to their liability for debts. Lands to which the owner became entitled by the third mode of acquisition, although, as already observed, incapable prior to the Wills Act 1869 of devise, were always liable to be taken in execution for debt and sold as personal estate during the life of the debtor, and upon his decease they passed to his heir subject to his debts. The bought lands being originally deemed chattels were liable, as and in the same manner as other personalty, to debts. The Act of 1662 which rendered bought quarterlands descendible, the reader will remember, expressly preserved the quality of devisability, an attribute which did not belong to lands of inheritance, and it is noticeable that it contains no reservation of the liability to debts, whilst in the Act of 1777, making all lands descendible, such liability is expressly reserved.

The interest of husband and wife respectively in the lands of each other depended, as did their descendibility and liability for debt, upon the title by which the lands were acquired. If the husband succeeded to the property as heir, or was the grantee under a *bargaine-eirey*, his widow was entitled as dower to one-half of the income for life, with the proviso *dum sola et casta vixerit*. This, both

<sup>1</sup> Statutes, Vol. 2, p. 216, section 7.

as to the extent of the dower and the conditions upon which it was held, looks like a survival of the ancient English law applicable to freeholds.<sup>1</sup> A singular feature in the Manx law is that in case the widow be other than the first wife, and there be issue of a former marriage surviving the husband, the widow is entitled to a quarter only of the lands. This restriction of the dower, however, did not apply to lands which only became vested in the husband after the death of the former wife. Lands acquired by voluntary settlement or devise stood in the same position with respect to dower as lands of inheritance. In the case of lands acquired either by the first, second, or third mode of acquisition, the husband was entitled to his curtesy consisting of half for life or until he married again. It is in the case of bought lands that we find the most singular characteristics in the law concerning the mutual rights of husband and wife. These lands being, as we have seen, anciently chattels, come necessarily under the law regulating the devolution of personal estate. In 1577 the two Deemsters<sup>2</sup> of the Island, at the command of the Lord, put into writing certain customs which were proclaimed at the Tynwald Day "to be holden for law."<sup>3</sup> The first of these, which was only repealed in 1777, was as follows:—

1. "Alsoe we give for law that if any man dye, the wife  
" to have the one half of all his goodes, moveable  
" and immoveable, and the debts to be paid out of  
" the whole; and alsoe the wife to have the one-  
" half of the tenement wherein she dwelles during  
" her widowhood."

If we now take a leap of 200 years we shall discover what a curious development the law underwent during the

<sup>1</sup> *Stephen's Commentaries*, Vol. I, p. 269. (12th Edition.)

<sup>2</sup> As to the meaning of the term Deemster and his functions, see the writer's article in this Magazine, February 1902.

<sup>3</sup> *Statutes*, Vol. I, p. 47.

interval. There is nothing in the known law of the Island to suggest a doubt that originally on marriage the personality of the wife became the absolute property of the husband as in England, and that the wife acquired no interest in her husband's estate during coverture, being simply entitled to a widowright on his death. Notwithstanding this, during the 200 years in question, there grew up a doctrine of community of goods which by 1777 had taken such a deep root in the Jurisprudence of the Island that it required an Act of the Legislature to eradicate it. The condition of the law in 1777 is tersely and clearly recited in the preamble to the Act of 1777. That which had by law been intended as dower, we are told, had by usage been so perverted that married women claimed "an absolute and distinct property " in one-half of the goods and chattels of their husbands." The wife predeceasing her husband, though she might have come to him entirely without dowry, was empowered to make a will disposing of half of her husband's personality to a complete stranger. Should she die intestate, administration was granted to her next-of-kin, "from whence it " often happens" (continues the preamble) "that a man in " *flourishing easy circumstances*, by the accident of his wife's " death is utterly ruined, his goods and effects being immediately inventoried and sold, and one-half of their value " distributed among strangers." Although the Act of 1662 had elevated "bought" quarterlands from the position of mere chattels to the rank of heritable lands, it is evident that so far as the wife's interest was concerned the change made no difference. The strange anomaly of a wife having power thus to divest her husband of half his property, although the mischief of it was so clearly recognised by the Legislature in 1777, was destined to survive in a modified but scarcely less mischievous form for three-fourths of a century longer. The first section of the Act of 1777 enacted that the widow should have "one-half of

"the goods and chattels, purchased lands, and premises," absolutely subject to one-half of the debts, but in case of the wife predeceasing her husband and without issue, her rights should cease. The sting, however, was in the tail of this enactment, which reserved to the wife the right of "making a will of the lands, premises and effects aforesaid, "even in the lifetime of her husband as heretofore accustomed, in favour of the lawful issue of her body or to "her husband, but of no other person whatsoever." This Legislative performance fell far short of the good intentions foreshadowed in the preamble, the danger to the husband of being "utterly ruined" still hanging over his head should there be issue of the marriage, or even of a previous marriage on the part of his wife. It was not until 1852 that the law was placed upon a more rational basis. An Act of that year<sup>1</sup> deprived a wife, dying before her husband, of all interest in his bought lands, and provided that her dower in such lands should consist of one-half absolutely, in case the marriage took place before the 6th January, 1853, and of one-half for life where the marriage was subsequent to that date. In dealing with the title to this description of lands, the date of marriage of any man, through whom the title is derived, is of prime importance unless it be known that he survived his wife, as in case the marriage be before the 6th January, 1853, and the wife survive, one-half of the lands devolves upon her heir. The husband's curtesy in the bought lands of his wife where the marriage was after 1853 is defined by the Act of 1852 as a life estate in one moiety. What his interest is if married prior to that date is a question which admits of no certain answer. Prior to 1662, when all bought lands were personalty, those of the wife would naturally fall to the husband *jure mariti*. Although in 1777 the bought quarterlands had been for more than a century real estate, the

<sup>1</sup> Statutes, Vol. II, p. 322.

Act of that year appears to regard them as still retaining, touching the relations of husband and wife, the incidents of personalty, in which case the husband's interest would be the same as in his own bought lands and other personalty. Dower and curtesy, which, owing to the Dower Act (3 & 4 William IV, c. 105) and the Married Woman's Property Acts, have ceased to be matters of much practical interest to English lawyers, in the Isle of Man still retain their importance. Several attempts to assimilate the law on this subject to that of England have failed in the Insular Legislature, and there appears little prospect of a change.

Dower was never, as in England, a claim superior to debts of the husband, where the land belonged to the class liable to debts. It was also easily released, the wife simply joining her husband in the conveyance. Fines and recoveries were barbarisms unknown to Manx law, and the Celtic wife was considered quite capable of protecting herself against the coercion of her lord without resort to the formality of a separate examination.

An equitable estate has always been liable to dower as well as curtesy, the peculiar anomaly swept away by the Dower Act 1834 (3 & 4 William IV, c. 105) never having prevailed in the Island.

There are numerous other distinguishing features belonging to Manx tenures, of which it would be impossible and probably uninteresting to give an exhaustive enumeration. Some of the most important, however, deserve mention.

Lands liable for debts could always be easily rendered available for this purpose. The proper officer, with a simple execution for a money debt in his hands, could seize a farm or a dwelling-house, and convert the same into money without more ceremony than if it were a horse or a merchant's wares. The execution need have no reference to the land, the duty of the coroner being to

seize such assets as he could discover, and, in default of personal estate being forthcoming sufficient to satisfy the execution, to appraise and sell the real estate of the judgment debtor. No judicial approval of the sale was required; and a deed of conveyance executed by the coroner constituted the sole title of the purchaser to the property. All lands are now in this position. The reader will have inferred from the foregoing remarks that the writ of *elegit* is unknown to Manx law.

Estates tail are unknown, the statute *De donis* not being applicable to the Island, and there being no custom authorizing entails. Words which in England would create an estate tail are construed in the Island as conferring a conditional fee as at Common law in England.

The celebrated rule in *Shelley's Case* is also equally a stranger, limitations of the nature which bring it into operation in England receiving the same interpretation as remainders in ordinary cases.

The word heirs has never been necessary to pass a fee by a conveyance *inter vivos*, much less by will. The intention of the parties is to be gathered from the language of the deed, and not from the presence or absence of mere technical words. This is a matter of much importance in the Island, especially in view of the fact that there is no legislation analogous to the Conveyancing Acts 1881, 1882, and 1892.

The Statute of Uses does not apply, a trust operating simply as intended and being enforceable as a matter of equity in the Chancery Division.

Much of the highly technical learning concerning remainders, reversions, and executory limitations, has no relevancy to Manx estates, owing to the freehold of the land being in the Lord.

The Inheritance Act 1833 (3 & 4 William IV, c. 106), which remodelled the laws of descent in England after

they had remained without change for the previous 500 years,<sup>1</sup> does not extend to the Isle of Man, nor is there any local legislation to the like effect. The law of inheritance in the Island is, however, by no means the same as that which prevailed in England prior to 1833. On the contrary, it has some marked peculiarities, amongst which we may mention that in the case of lands acquired by inheritance, if the deceedant die without issue, his eldest brother by the same parent from whom the estate descended, whether of the whole or half-blood, succeeds as heir to the estate. The\* object being, in theory at all events, to discover an heir deriving his blood from the first purchaser, there would seem to be no ground for the exclusion of a brother of the half-blood, a child of the ancestor through whom the estate descended. In the case of purchased lands (using the term in its technical sense), the half-blood is rigorously excluded. Coparcenary is unknown in the Island, the eldest female inheriting alone in default of males.

There is no joint tenancy, a gift to two or more persons and their heirs creating merely a tenancy in common. Should the grantees be husband and wife, they take as tenants in common and not an estate by entireties.

In conclusion, the important fact should be pointed out that to be heir it is not necessary that the child should be born in wedlock. Amongst the ordinances and customary laws promulgated in 1594, it is declared: "10. Also we  
" give for law that if a man get a maid or young woman  
" with child before marriage and within a year or two  
" doth marry her, if she was never slandered nor defamed  
" with any other man before, that child begotten before  
" marriage shall have his father's corbe and his farme  
" according to the ancient custom of this Isle."<sup>2</sup> In the case of *Quane v. Quane*<sup>3</sup> it was held by the Judicial

<sup>1</sup> *Stephen's Commentaries*, Vol. I, p. 369.

<sup>2</sup> *Statutes*, Vol. I, p. 68.      <sup>3</sup> 8 *Moore's P. C. Reports*, p. 63.

Committee of the Privy Council that a child *born* within two years before the marriage was legitimate, thus overruling the contention founded upon the strict wording of the Act, that the marriage must be within two years of the *begetting*. Giving birth to a previous illegitimate child has been held by the Insular Courts to constitute the mother a defamed woman within the meaning of the enactment. The real difficulty in the application of this crudely-worded law arises from the ambiguity of the phrase "within a year or two." Is two years the maximum period allowed, or are the words susceptible of a looser interpretation? In a recent case, where the period was two years and nine months, the Court of first instance decided that the child was illegitimate, but in the Appellate Court of the Island the Judges were equally divided. Unfortunately for the certainty of the law, the intention to appeal to the Privy Council was abandoned, owing to the parties having compromised their differences.

G. A. RING.

## II.—COMPARATIVE ROMAN LAW.

### PART II.

COMPARISON with English law has already been treated in the last number of the *Law Magazine and Review*. Books and articles dealing with the comparison of Roman law with other than English systems are very numerous. The amount is enormous, how great only those who have specially studied the subject can tell, especially as we begin many centuries earlier than the Roman-English comparisons.

There are possible beginnings in a vague way in Cicero, but we have nothing definite until Gaius. In i, 55, he says, following Cæsar,<sup>1</sup> that the Galatians had the same *patria*

<sup>1</sup> *De Bell. Gall.*, bk. vi, c. 19.



*potestas* as the Romans, and in i, 193, he compares the law of Bithynia to the law of Rome in respect of contracts made by married women and infants. It is to be noticed that Justinian omits both these texts. In iii, 96, Gaius suggests that an obligation might be contracted by oath if one were to search the particular laws of foreign States.<sup>1</sup> The next landmark is the *Lex Dei*. This document, also known as the *Mosaicarum et Romanarum Legum Collatio*, is of uncertain authorship, and was probably written about A.D. 390. The interest of it for the present purpose is that it is the earliest attempt at a sustained comparison of Roman law with another system. It is, however, of the baldest description, and the comparison is made by simple juxtaposition without any comment by the Author. It consists of sixteen titles, all but one beginning with the words *Moyses dicit*. The sixteenth begins with the words *Scriptura divina sic dicit*. The short statement of the Mosaic law at the head of each title is followed by a more or less lengthy apparatus of Roman juristic opinion, Ulpian, Paulus, and Papinian being the jurists chiefly cited. The comparative works next in order are all of a similar nature; it was quite the fashion to compare the *jus soli* and the *jus poli*. The *Nomocanones* of the Byzantine canonists make comparisons as a rule by setting out, sometimes with *scholia*, sometimes without, the respective texts of secular and ecclesiastical law, generally distinguished as *leges* and *canones*. A good example is afforded by the *Nomocanon* of Photius (*circ.* 880), where the compiler contrasts the old secular Roman law of marriage with the changes introduced in the Lower Empire (Tit. xii, c. 13).<sup>2</sup> Occasionally there is an assertion of independence. For instance, John of Antioch (*circ.* 570)

<sup>1</sup> Gaius is himself compared with Justinian in the modern works of Gneist, Pellecat, and Holland.

<sup>2</sup> Voel, *Bibliotheca Juris Canonici Veteris* (1661), p. 1071. The texts of most of the Canon law documents will also be found in Beverege, *Pandectæ Canonum* (1672), and Zachariæ, *Jus Græco-Romanum* (1856—1870).

says—to use the Latin translation<sup>1</sup>—*sciendum est hanc constitutionem*<sup>2</sup> *apostolicis canonibus et sanctis synodis adversari*. Besides the *Nomacanon*es some other legal documents of the period contain comparisons, generally of a very crude nature, *e. g.*, the *Syntagma* of Matthæus Blastaris. On lines similar to those of the *Nomocanon*es are the *Speculum Juris Canonici* of Peter of Blois,<sup>3</sup> and *Magistri Ricardi Anglici Ordo Judiciarius*.<sup>4</sup> Other works dealing with the same subject are *Vocabularius sive Expositio Terminorum Juris utriusque* (1476), S. Ximenez, *Concordantiæ utriusque Juris* (1596), C. Rittershus, *Differentiæ et Juris Civilis et Canonici* (1668), Petrus de Marca, *De Concordia Sacerdotii et Imperii* (1662), Meerman (1751), and Van Espen (1753). In the latter see especially Vol. iv, p. 180, *Leges Codicis Justinianæ necnon Novellæ ejus Constitutiones utiles sunt pro disciplina ecclesiastica*. In more recent times have appeared the works of Colquhoun,<sup>5</sup> J. B. Duchesne, *Du Mariage, Examen Comparatif des Principes qui le régissent suivant le Code Civil français, le Droit Canonique, &c.* (1845), R. Sohm, *Recht der Eheschliessung nach dem deutschen und Canonischen Recht* (1875), and W. Kaempfe, *Die Begriffe der Jurisdictio Ordinaria, &c. in römischen canonischen und gemeinen deutschen Rechte* (1876).<sup>6</sup> There are several books containing comparisons between Roman law and modern Greek Canon law. One of the most recent is Nikolaïdes, *περὶ τῆς μοναχικῆς ἀκτημοσύνης* (1901), which deals with the changes made in the enactments of the Code and Novels to suit modern requirements.

*Roman and Ancient Greek.*—A good deal of this must be conjectural, as the latter is so imperfectly known. Notwith-

<sup>1</sup> Voel, p. 624.

<sup>2</sup> *Viz.*, a passage of the Code as to proceedings against bishops.

<sup>3</sup> Berlin (1837). P. 16 of this edition contrasts Canon law and English law as to reckoning grades of consanguinity.

<sup>4</sup> Edited by C. Witte (1853).

<sup>5</sup> See last number of the *L. M. & R.*

<sup>6</sup> For England see Sir G. Bowyer, *Readings*, p. 140 (1851), and Maitland, *Canon Law in England* (1898).

standing, several works on the question exist. The earliest is probably Heineccius' *Jurisprudentia Romana et Attica* (1731). The best known are no doubt Leist's *Græco-italische Rechtsgeschichte* (1884), and the same writer's *Altarisches Jus Gentium* (1889), and *Altarisches Jus Civile* (1892—1896). See also Zoeller, *Griechische und römische Privataltertümer* (1887), and on a special subject Schulin, *Das griechische Testament verglichen mit dem römischen* (1882).

*Ancient and Modern Roman.*—For this Savigny and the numerous German works on *Pandektenrecht* should be consulted. Books in the English language are Gould's *Translation of Goudsmit's Pandects*, a Treatise on Roman Law and upon its connection with the modern Legislation (1873), and Tomkins and Jencken, *Compendium of the Modern Roman Law* (1870). Of special importance to Englishmen is the Roman-Dutch law in its relation to classical Roman law. On this subject Voet, *Commentarius ad Pandectas* (1698—1723), led the way. The sub-title shows the scope of the enquiry. It is *in quo præter Romani juris principia ac controversias illustiores jus etiam hodiernum et præcipue fori quæstiones excutuntur*. English works are J. G. Kotze, *Translation of Van Leeuwen's Commentaries* (1881), Sir R. K. Wilson, *Translation of Voet's Commentarius ad Pandectas* (1876—1897), T. Berwick, *Contribution to an English Translation of Voet's Commentary on the Pandects* (1902), Van der Zyl, *Theory of the Judicial Practice of the Cape, &c.* (1902), G. T. Morice, *English and Roman-Dutch Law* (1903), and two translations of Grotius, the *Introduction to Dutch Jurisprudence*, by Von der Made (1878), and the *Opinions*, by De Bruyn (1894). The Roman-Dutch law of Ceylon has produced a comparative work in Casie-Chitty, Voet's Titles on *Vindicationes* and *Interdicta* (1893). In countries regulated by Roman-Dutch law classical Roman law is received only as a *subsidium*, and the *usus modernus* is the practical law. But in order to ascertain the grounds on which this rests,

a comparison with Roman law is essential. The differences are considerable, the Roman-Dutch doctrine of *retractus* is an example.

*Roman and French.*—Works of this nature, like those in the following paragraphs, are so numerous that the present writer can do no more than name those which have come under his own observation, probably not half those in existence. But even what is done here may serve to prepare the way for a fuller bibliography hereafter. The French have not been perhaps as prolific as the Germans, still the output is very large. The earliest<sup>1</sup> which the present writer has discovered is the *Syntagma Juris Universi* of Tholosanus (1633), where there are comparisons also with Canon and German law, but those with French law are more frequent. Two centuries later appeared the huge work of St. Edme, something on the lines of Sir P. Colquhoun's work, *Dictionnaire de la Pénalité dans toutes les parties de la monde connue* (5 vols., 1828). Other comparative works dealing with criminal law are Desjardins, *Traité du Vol spécialement dans le Droit romain* (1881), and Tissot, *Le Droit pénal étudié dans ses principes et dans les Lois des différents peuples du monde* (1887). A work of general comparison is Typaldo-Bassia, *Le Droit romain; Exposé de ses principes fondamentaux et de ses rapports avec le Droit français* (1898).<sup>2</sup> On family law may be named Pénicaud, *Étude sur la condition légale des Femmes en Droit* (1868), Gide, *Étude sur la condition privée de la Femme dans le Droit ancien et moderne* (1885), and Teissier, *Des obligations alimentaires dans la famille à Rome et en France* (1880). Compromise has been a favourite subject. See Dumas, *De la Transaction en Droit romain et en Droit*

<sup>1</sup> One might expect some comparison in Cujacius, but an examination of his voluminous works has failed to bring any to light.

<sup>2</sup> This seems to supersede the earlier work of the Duc de Pasquier, *L'Interprétation des Instituts de Justinien avec la Conférence de chaque paragraphe aux Ordonnances royaux* (1847).

*français* (1871), and books on the same subject by Viardot (1871), and Lepelletier (1890). Other works dealing with special subjects are Massol, *De l'obligation naturelle en Droit romain et en Droit français* (1858), Béchard, *Droit municipal dans l'antiquité, au moyen âge, et dans les temps modernes* (1861—1866), Deflers, *Des obligations divisibles et indivisibles en Droit romain et en Droit français* (1863), Machelard, *Examen critique des Distinctions, soit en Droit romain soit en Droit français, en ce qui concerne les servitudes prédiales* (1868), Trolley, *Étude sur la Lésion en Droit romain et en Droit français* (1871), and a similar study *sur la chose d'autrui* (1872), Milhand, *Droit romain des actes apparents et simulés. Droit français de la simulation dans les actes juridiques* (1889). In addition to all these works, reference may be made to those of E. Lambert (already named), and to Troplong, *De l'Influence du Christianisme sur le Droit Civil des Romains* (1868).

*Roman and German.*—The earliest comparative work is perhaps the interesting book of Beyer, *Delineatio Juris criminalis secundum Constitutionem Carolinam* (1714). There has been considerable activity in recent years in the comparison of the provisions of the new Civil Code with Roman law, or at least with the received Roman law as it was in vogue up to 1900. G. von Buchka, *Vergleichende Darstellung des bürgerlichen Gesetzbuches für das deutsche Reich und des gemeinen Rechts* (1898), deals with the whole law. Partial comparisons are made by Leske, *Vergleichende Darstellung, &c. und des preussischen allgemeinen Landrechts* (1898—1903), by Oertmann, *Die Vorteilsausgleichung bei Schadenersatzanspruch im römischen und deutschen bürgerlichen Rechte* (1901), by Kniep, *Der Besitz der bürgerlichen Gesetzbuch gegenübergestellt dem römischen und Gemeinen Recht* (1900), and by Foster, *Der Kreditauftrag. Eine Studie nach römischen und neuem bürgerlichen Rechte* (1903); and no doubt there are

others of a similar nature. As early as 1856 F. Hahn, in *Die materielle Uebereinstimmung der römischen und germanischen Rechtsprinzipien*, supported the identity of Roman and the pre-Code German law in their main principles. Several other comparative works followed, but except for their historical interest they must have become obsolete since 1900. Among these are—besides the *Pandektenrecht* books already mentioned, and the works of Bethmann-Hollweg, Keller, and others very well known—Heffter, *Institutionen des römischen und deutschen Civil-Prozesses* (1825), *System des römischen und deutschen Civil-Prozessrechts* (1843), Pagenstecher, *Die römische Lehre von Eigenthum in ihrer modernen Anwendbarkeit* (1857), Vering, *Geschichte und Pandekten des römischen und heutigen gemeinen Privatrechts* (1875 and 1887), Eisele, *Die Compensation nach römisches und gemeines Recht* (1876), Gallinger, *Der Offenbarungseid* (1884), and Gerth, *Der Begriff des Vis Major im römischen und Reichs-Recht* (1890). A reference to O. Mulbrecht, *Wegweiser durch die neuere Litteratur der Rechts- und Staatswissenschaften* (1893), would give the names of other publications of a similar nature.

*Roman and Italian.*—The Bologna jurists contain little or nothing in the way of comparison. The *Liber Feudorum* affords one or two instances, e.g., in ii, 58, 5, where an opinion of Marcellus, cited by Ulpian in *Dig.* xxv, 2, 11, as to the oath in the *actio rerum amotarum*, is stated to be contrary to the Lombard law. Alciatus, *Responsa* (1582), has a few comparisons. In modern times the subject has been treated generally by Crivellari, *Il Codice penale per il Regno d'Italia interpretato sulla scorta della dottrina, delle fonti, della legislazione comparata e della giurisprudenza* (1890–1898), and Camous, *Il Codice civile Italiano coordinato alle leggi affini ed alla giurisprudenza* (1894). The office of notary is treated from the comparative point of view by E. Durando,

*Il Tabellionato o Notariato nelle Leggi romane, &c.* (1897). The *Dissensiones Dominorum* has been compared with modern Italian law by Rivalta, *Dispute Celebri* (1895).

*Roman and Spanish.*—The *Siete Partidas* and the *Novísima Recopilacion* contain some vague references to Roman law, but nothing that can very well be called comparison. A good book which has appeared in recent times is Walton, *Civil Law in Spain and Spanish America* (Washington, 1900).

*Roman and Roumanian.*—A recent work is Alexandresco, *Droit ancien et moderne de la Roumanie* (1898).

*Roman Law Countries inter se.*—Works of this kind are fairly numerous. The *Syntagma Juris Universi* contains a good deal of comparison of French and German law as it existed in 1633. Other comparative works are the comparison of the French and German codes by Förtsch, (1897), and Weisl, *Das Militär-Strafverfahren in Russland, Frankreich, und Deutschland* (1894). The French and Italian codes are compared by Huc, *Études de Législation comparée*, (1868). The French and Belgian codes, with others, are the subject of Lanfranc de Panthon, *Étude de Législation comparée. Les Codes français comparés aux Codes de Genève, de Belgique, et d'Allemagne*, (1878). For French and Dutch see Wintgens, *De præcipuis Differentiis Juris Francici et Neerlandici* (1838). These books are of course only a small proportion of the literature of the subject. For further information the various periodicals dealing with comparative law should be consulted, as should also the learned work of Lambrecht's, *Dictionnaire-pratique du Droit comparé*, begun in 1895.

JAMES WILLIAMS.

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### III.—STATE PROTECTION OF SUBJECTS ABROAD.

INTERNATIONAL LAW is not a finished product ; but is still in process of growth. It has broad doctrines formulated long ago, which are extended, modified, or rejected as the manifold exigencies of international relations give rise to fresh subjects for the application of its principles. Hence it follows that the protection given by States in recent years to their subjects in foreign countries is the residuary legatee of a somewhat lengthy progression. It rests upon a foundation of long-established and universally recognised principles, the application of which to more recent events may fitly form the basis of the present investigation.

One of the most fundamental ideas of the postulated nature of a State is, that it possesses the right to do whatever is necessary for manifesting and preserving its independence, provided that it respects the correlative rights of others. To effect this it is clothed with the mantle of an absolute and exclusive authority within its own dominions, subject to certain modifications arising out of its relation to other States. So long as it remains rigidly isolated and refrains from interfering with others it may proceed on whatever lines it pleases ; but so soon as it takes a position as a State among States and maintains intercourse with them it can no longer claim an absolute authority within its own borders.

Martens says : “ *Chaque nation a ses droits particuliers mais l'Europe a aussi son droit, c'est l'ordre social qui le lui a donné.*”<sup>1</sup>

This modification is due mainly to the action of the doctrine, equally fundamental to the idea of a State, that it possesses certain rights of sovereignty over its subjects,

<sup>1</sup> *Recueil Nouveau*, tome x, p. 199.



and has corresponding duties towards them. The common will dominates the individual members of a State, and in virtue of that supremacy places certain obligations upon them which continue even though the individual passes within the limits of a foreign jurisdiction. A subject is not freed from the bond which unites him to his country when he leaves its territory; but owes it an allegiance which is still intact. This obligation is mutual, and to the duties placed upon him are joined inseparably correlative rights.

It is the interaction of these two fundamental doctrines that defines the position of the subject of one State within the territory of another. He has rights and duties in regard to both the State of his origin and the State wherein he is a temporary or permanent resident.

In virtue of its territorial sovereignty a State may be said to possess a co-extensive jurisdiction, but to this right there are several well-recognised exceptions which owe their origin to definite immunities conferred upon sovereigns and subjects of foreign powers. Such immunities are only given in a few well-defined cases, and as they are exceptions to the general rule it is advisable to treat them before dealing with the broader proposition.

While within foreign territory a sovereign as such possesses immunity from all local jurisdiction. He is exempt from all dues, cannot be proceeded against in the civil or criminal courts, and is not subject to police regulations. Should he assume the character of private individual and travel *incognito*, he becomes amenable to the foreign jurisdiction, but by declaring his identity he recovers the privileges of his rank.

A diplomatic agent cannot be tried for a criminal offence, though in extreme cases this recall may be demanded, and even his arrest take place, while an application for redress is forwarded to his government. In regard to civil process, opinions differ as to his immunity: some international

lawyers say that his consent is necessary for the exercise of local jurisdiction, while others maintain that in matters not connected with his official character his property within the jurisdiction, other than that necessary to his official position, is subjected to the operation of the local laws. Custom, however, as evidenced by the civil codes of various countries, tends towards an express immunity.

*"Les envoyés ont, en outre, droit à l'extraterritorialité. Ce droit s'étend à leur suite et à leur demeure."*<sup>1</sup>

Certain immunities are also extended to armed forces and war vessels; and they are not regarded as subject to the local jurisdiction. Public ships other than war vessels are not subject to civil process in foreign ports. These immunities are granted to them in their capacity as representatives of a foreign sovereignty.

Merchant vessels also enjoy a certain amount of immunity, especially by the law of France. It regards the crew of a merchant ship in a foreign port as an organised body of men subordinate to a recognised internal authority. Local jurisdiction operates only in cases where the acts of the crew directly affect persons or property not belonging to it.<sup>2</sup> This view is not unassailable, though it is a general practice to allow consular jurisdiction over merchant vessels in regard to purely internal questions.

After this catalogue of universally recognised exceptions the general rule again applies. The position of an alien is relative both to the State of residence and the State of origin. Though possessed of the usual rights of life and personal freedom, he is or rather was under a general disability as regards the holding of property. An alien was not allowed to hold real property, save under special conditions, till within comparatively recent times; though the

<sup>1</sup> M. Bluntschli, *Droit International*, section 196.

<sup>2</sup> Cf. Mr. Webster's statements with reference to the *Creole Case*, Aug 1, 1842. State papers, 1843, lxi, 35.

general modern tendency is to allow him to hold freely.<sup>1</sup> The effect of the long-established *droit d'aubaine* is now greatly mitigated. Some distinction is drawn between foreigners who are permanently resident and those whose stay in the foreign country is merely temporary. The latter are not liable to taxes and rates specially incident on a permanent residence, though they may have to pay a capitation tax for entry, and are not allowed in some countries to hold real property. "The transient foreigner cannot acquire property in real estate of any class."<sup>2</sup>

As regards the foreign country, the alien has no political privileges nor has he the status of a subject and a citizen. He must conform to the local laws and regulations; is bound to respect the constitution, not in the capacity of a subject, but because he must submit to the power and authority of the country. He is liable to the payment of taxes and subsidies even of an extraordinary character, as war imposts and the like, and to share in all burdens not attached to a citizen status. Within certain limits he is amenable to criminal jurisdiction and to the civil tribunals, where he is required to submit to the formalities necessary to give legal effect to his contractual and other relations.<sup>3</sup>

Article 14 of the Mexican Code states that—

"Foreigners are obliged to contribute towards public expenses in the manner prescribed by the laws, and to obey and respect the institutions, laws, and authorities of the country, submitting to the judgments and sentences of the tribunals, without power to seek other protection than that which the law concedes to Mexican subjects."<sup>4</sup>

As a resident within the territory he may be enrolled in the police force, and even in the militia or National Guard, though generally he cannot be called upon for service as an ordinary soldier, save to a limited extent for the defence of

<sup>1</sup> Cf. Naturalisation Act 1870.

<sup>2</sup> Hamilton's *Mexican Law*.

<sup>3</sup> Cf. *Leroux v. Brown* ([1852], 12 C. B. 801).

<sup>4</sup> Hamilton's *Mexican Law*.

the territory from foreign invasion.<sup>1</sup> This doctrine would seem to apply only to foreigners domiciled or temporarily settled in the country.

*"Les étrangers ne peuvent être astreints au service militaire. Il pourra être fait exception à cette règle si cela est nécessaire pour défendre une localité contre des brigands ou des sauvages,"* says M. Bluntschli.<sup>2</sup> "In France, Article 3 of the civil code provides that '*les lois de police et de sûreté obligent tous ceux qui habitent le territoire.*' This provision comprises the obligation to suffer expropriation, to pay taxes, but not to serve in the army or navy, which is considered rather as a 'political right,' and so appertaining only to Frenchmen."<sup>3</sup>

This doctrine would tend to show that an alien may be compelled to maintain social order, but cannot without his consent be enrolled in a force collected for political or national purposes. This is expressly stated in several treaties (*cf.* treaties between France and Chile in 1846; France and Russia in 1857; United States and Italy in 1871; Great Britain and Roumania, and Great Britain and Servia in 1880, whereby the subjects of each of the contracting parties are exempt from service in the army, militia, and National Guard of the other party. In the treaty of 1855 between the Zollverein and New Mexico, military service is not compulsory "*mas no del de policia en los casos, en que para seguridad de las propiedades y personas fuere necesario su auxilio, y por solo el tiempo di esa urgente necesidad.*"<sup>4</sup> Military service is essentially a civic or political obligation and cannot be separated from a political status, so that if the privileges of a subject are withheld it is only just to prevent the imposition of duties peculiar to a subject. A foreigner might otherwise be drawn into a quarrel in which he had no interest or which might possibly

<sup>1</sup> *Cf.* Naturalisation Commission, Appendix to the Report, 42.

<sup>2</sup> Section 391.

<sup>3</sup> Sewell, *French Cases affecting British subjects.*

<sup>4</sup> *Nouv. Rec. Gén.*, xvi, 11, 257.

be against his country. In the late Transvaal war, British subjects resident in the Transvaal were illegally compelled to serve in the general levies. So, too, in the American civil war, some English citizens were forced to enter the militia of the State of Wisconsin and to join in the struggle. The reason given was that they had exercised some rights of franchise. This, however, had not, *ipso facto*, made them American citizens, and diplomatic representations were made in remonstrance.

On the other hand, the State within whose boundaries a foreigner resides should provide an equitable administration of its laws, and a protection to be given equally to its own territorial subjects and to the stranger within its gates. Provided that the native is not given an undue preference, as a rule a foreigner cannot complain though he may suffer a considerable practical injustice. When this equality is not given, and no remedy is provided for obvious wrongs, when Government officials abuse their power to the detriment of the foreigner, and legal redress is unobtainable, then a State has plainly neglected its duties and renounced its claim to an exclusive authority within its own dominions.

A State is regarded as responsible for the preservation of order, and may be liable for the acts done by its agents in contravention. But it is not responsible when the law is set at defiance by civil commotions or mob violence which it is unable to control.<sup>1</sup> In 1851 riots took place in New Orleans and Key West directed against the Spanish residents. The Spanish consulate was attacked and much injury done to private persons and property, for which reparation was demanded by the Spanish Government. In Mr. Webster's reply it was stated that a just indemnity might be provided in respect of the consul; but the Spanish subjects were only entitled to such protection as was afforded the citizens of the United States.

<sup>1</sup> *Snow's Cases*, p. 181.

"These private individuals, subjects of Her Catholic Majesty, coming voluntarily to reside in the United States, have certainly no cause of complaint if they are protected by the same law and the same administration of law as native born citizens of this country."

A government, however, is generally understood to be liable internationally for injuries done to alien residents by a mob which by due diligence it could have suppressed. In 1891 there was a second outbreak at New Orleans, this time against various members of the notorious Mafia. They were arrested on suspicion of murder, and, though acquitted, were taken from the gaol and hanged or shot by the mob. No serious attempt was made on the part of the proper authorities to quell the riot, and though the Italian Government eventually withdrew the demand for the punishment of the actors in the affair, and accepted a money indemnity instead, yet the United States took upon itself the responsibility for the acts of the mob.<sup>1</sup>

In time of war or civil commotion no State is bound to compensate resident foreigners to a greater degree than its own subjects.<sup>2</sup> During the American Civil War the British Government refused to procure compensation for injuries inflicted by the forces of the United States on the property of British subjects. The claimants were informed that they must have recourse to such remedies as were open to citizens of the United States. After the Franco-German War of 1871 no distinction was made between natives and foreigners with reference to compensation.

As between a State and its subjects in foreign countries there is still an obligation on the latter to regard its laws. The State may demand that his acts be taken at the value which it thinks fit to attach to them. Social relations still exist, together with a power of punishment when the offender returns, even for acts done outside its territory. The bond of allegiance is not severed; while questions of legitimacy, majority, and marriage are determined by the State so far as

<sup>1</sup> *Snow's Cases*, p. 183.

<sup>2</sup> Bluntschli, section 380.

the effects of the subject in its own dominions are concerned. To these duties owing by the subject to the State are joined duties of that State towards its subjects. A subject is still an integral part of the national community and as such has claims upon his country. According to M. Bluntschli<sup>1</sup> the State has the right and duty to protect its subjects in a foreign country by all the means authorised by International law: (a), in cases where the foreign State has taken steps against them in contravention of the principles of that law; (b), where the injustice or loss suffered by its subjects is not directly the act of the foreign State but of those whose wrongful actions it has done nothing to oppose. Every State has a right to demand reparation for such injustice and redress for the loss sustained, and to exact according to circumstances guarantees against a repetition of similar acts.

The *bonâ fides* of the parties must be taken for granted in all these cases. Where a State, as represented by its tribunals, under a specious guise of justice, denies a foreigner a fair treatment simply because he is a foreigner, then there is reasonable cause for diplomatic remonstrance. An unsuccessful litigant may not, however, demand this as of right when he has lost an action which he thought he ought to have won, or where the unfavourable decision is not in accordance with the legal standards of his own Courts. Lord Derby was right in refusing in 1878 to take up the demand of English creditors and force Turkey to pay its debts. A distinction has been made, and especially in England, between the complaints of persons who have lost money through the default of a foreign State and those who have suffered in other ways. In the latter case, the question is simply one of expediency based on the importance of the occurrence and of the degree of interference necessary. In the former case, the responsibility would be too onerous, having regard to reckless and improvident speculators.

<sup>1</sup> Section 380.

This attitude is required as a deterrent to such conduct. Lord Palmerston says, in a circular addressed to British representatives in foreign States:

"If the question is to be considered simply in its bearing on international right, there can be no doubt whatever of the perfect right which the government of every country possesses to take up as a matter of diplomatic negotiation any well founded complaint which any of its subjects may prefer against the government of another country, or any wrong which from such foreign governments those subjects may have sustained; and if the government of one country is entitled to demand redress for one individual among its subjects who may have a just but unsatisfied pecuniary claim upon the government of another country, the right so to require redress cannot be diminished merely because the extent of the wrong is increased, and because instead of there being one individual claiming a comparatively small sum there are a great number of individuals to whom a very large amount is due. It is therefore simply a matter of discretion . . ."<sup>1</sup>

Great Britain has generally refused to act as bailiff and debt collector, in order to give a salutary warning to reckless speculators; though the German government has adopted a somewhat different policy, more particularly with reference to some of the weaker Powers, as in the recent case of Venezuela.

The method by which an excessive application of the authority of a State within its own dominions is prevented, is the protection afforded by another State to its subjects resident abroad. Such protection is permitted by the foreign State for two reasons; the one being the respect for the rights of sovereign States, the other the jealousy of the advantages given by its special form of constitution and administration displayed by a State towards foreigners.

The exclusive rights of sovereignty are also limited by the attempt on the part of modern legislation to give effect to the relations of private individuals as they actually exist. To attain this object, the territorial law gives way to the law of the country to which the foreigner belongs in case of conflict between the two. By this indirect action it might be said that a subject's rights are protected; but

<sup>1</sup> Quoted by Phillimore, ii, section v. See also *Times*, Jan. 7, 1880.



private International law is somewhat removed from the present investigation, as it consists of rules governing the relations of foreigners as private individuals and not as members of a recognised State.

"The necessity of the general welfare has sanctioned certain exceptions to the rule *statuta suo clauduntur territorio, nec ultra territorium disponunt*, and the civil legislation of one nation may through the comity of another nation have an effect given to it beyond the limits of its territory. But there is no such comity in regard to the criminal legislation of a nation, and where the criminal law of one nation has effect given to it within the territory of another nation it is in virtue of express conventions."<sup>1</sup>

Protection may be said to act in two ways—directly, and indirectly.

In the one "it provides a material sanction for rights; it does not offer a theoretic foundation; it does not act within a foreign territory with the consent of the sovereign; it acts against him contentiously from without."<sup>2</sup> In the other, the legal aspect is emphasised. Acting as a factor of convention and custom, it may be somewhat disguised under the appearance of jurisdiction; but the essential elements remain firmly founded in protective rights. In treating a subject like this it would seem advisable to investigate the indirect action of protection first. The obligations existing between subject and State in English law are derived from the Crown prerogative, Parliamentary enactments, and Common law. To these is joined the duty of protection to be afforded to the subject.

The representatives of the sovereign whereby those protective rights materialise and are put into action are diplomatic agents, naval and military officers, and consular agents. In Cyprus, South Africa, and the West Pacific, England is represented by a High Commissioner, and in the Oil Rivers Protectorate by an Imperial Commissioner. In States of the European type diplomatic agents, as for

<sup>1</sup> Travers Twiss, *Private Int. Jurisp.*, p. 266.

<sup>2</sup> Hall, *Foreign Jurisdiction of the British Crown*, p. 4.

instance, ambassadors, are accredited to the various foreign countries, and they must be personally acceptable to the foreign Power.

The protection given by these agents varies considerably, according to the State wherein they are placed. If the State in question possesses a standard of civilization equal to that of European Powers, and if the ideas of law and personal rights prevalent among them are recognised by it, the same method of obtaining protection is not adopted as in the case of States whose civilisation does not reach that standard.

In recognition of the rights of foreign States over and towards their subjects a delegated or quasi jurisdiction is granted to consuls. The criminal and civil Courts still have supreme control over persons within the country; but a delegated authority is given. This authority is evidenced by the consular jurisdiction in cases of mercantile disputes and merchant vessels within the territorial waters of a foreign State. A consul has no magisterial powers, nor has he coercive authority, and hence his position is rather that of an arbitrator. He has full charge of passports, performance and registration of marriage, births and deaths, notarial acts, and the protection of property. In the case of crime, committed on a British ship within foreign territorial waters (as in a river below bridges), and crimes committed within three months previous to reaching the foreign country, he can hold an enquiry and take evidence. In more serious cases of crime the consul calls a naval Court, and so brings pressure to bear on the offender.

The consul is generally allowed to have exclusive charge of the internal order of a vessel belonging to his own nation, and the local authorities intervene only when members of the crew have disturbed the local peace and order. In 1889 a murder took place on board a British steamer at San Ramon Manganillo in Cuba. No external disturbance took

place, and the Spanish authorities refused to take cognizance of the case, holding it to be one for the exercise of British jurisdiction. These powers must not be regarded as ousting the local jurisdiction; still more if their effects are extended to foreign territory. Every country has the right to enforce its own criminal and police regulations, and such offenders are liable to be tried locally. In such cases, it is the duty of the consul to see that the accused has a fair trial and that no infraction of International law takes place.

That these consular powers are delegated may be proved by the fact that they are not allowed to be used as a means of avoiding or acting contrary to local laws. If municipal law clashes with foreign law, the consul must not act inconsistently with the law of the country wherein he resides. So the celebration of marriage, or the administration of an oath, in the German Empire, by anyone other than a duly qualified German official, is punishable by fine and imprisonment.

In time of war, or if an European State has no agents in a foreign country, it will sometimes place its subjects under the protection of another European State, and will ask its Agents to protect the rights of those subjects. The Consulate affords an asylum to fugitives from outrage.

When a foreigner feels aggrieved he must first try to obtain redress in the local Courts. If no such means are open to him, a request must be forwarded through diplomatic or consular agents to the local officials; should that prove fruitless, recourse must be made to diplomatic representations through an accredited agent, and finally the question, if still undecided, must be left to be settled by one government with another.

In States where an European standard of civilization has not been reached, a voluntary and permanent surrender of jurisdiction is made, modelled on the delegated consular jurisdiction of European States. On the one hand is an

extensive foreign jurisdiction, on the other a correlative derogation from sovereign authority. While in European States consular powers are strictly limited, in semi-civilised and Oriental States they are far wider. These latter nations understand a personal authority more readily than the intricacies of a theoretic jurisdiction.

These derogations originated in early times in quasi-judicial powers granted to consuls in European ports in mercantile cases. Sometimes they were even independent of the territorial sovereignty, as in the case of the letters patent granted by Richard III in 1485 to Lorenzo Strozzi at Pisa.

In the Ottoman Empire consular powers were at first exercised solely in deciding disputes where both litigants were Europeans. Mixed suits and criminal cases were beneath the local jurisdiction, though a consular interpreter was always present during the trial as a check against arbitrary decisions. These specific powers were gradually extended until, partly by custom, partly by confirmatory treaties, they reached their present limits. The treaties by which these powers were granted are called Capitulations. In 1675 these Capitulations confirmed and extended previous concessions. By the 18th Article, Great Britain was placed in the same position as the most favoured nations. Exclusive criminal and police jurisdiction, where British subjects alone were concerned, was secured in 1829, whereby Russia and consequently Great Britain obtained that their subjects "*demeureront sous la jurisdiction et police exclusive du ministre et des consuls.*"

In other States these privileges were acquired later, though the same considerations existed which caused the European States to obtain the immunities granted to their subjects in Turkey. No less a degree of protection is required in countries with a civilisation different in essence than among countries where the same kind and degree

of civilisation has been attained. Hence, the form of protection afforded in European States will also exist in the East, in addition to those special methods found peculiarly adapted to an Oriental or semi-civilised state of society, while protective rights beyond the limits already described will possess a more strictly jurisdictional aspect.

• “Superficially, when a British consul tries an English prisoner, or adjudicates on a case between two British subjects, he is merely the agent of a State to which the territorial sovereign has granted authority to enforce the duties that are owed by its subjects. In fact, he protects those subjects from the operation of unfit or unequal laws, and from the danger of corrupt or biassed or ignorant Courts. European States have only troubled themselves to obtain, and they only care to possess, their delegated jurisdiction in Oriental countries as a form of their protective rights.”<sup>1</sup>

That such powers are not inherent but are delegated is emphasised by the fact that, where a doubt exists as to whether the territorial sovereign did or did not confer them, the consul has to give way to the local authorities, and that in any case he must only act strictly within the somewhat narrow province marked out for the exercise of his powers by agreement or treaty. Physical boundaries are defined within which consular jurisdiction is allowed to prevail, but outside those limits the territorial tribunals have exclusive authority.

Closely resembling the protection afforded those who are strictly speaking subjects of a foreign State, there may be mentioned the protection given to certain classes of persons who are granted analogous privileges. They are generally connected in some way with the official character of the consulate as dragomans, servants, and their families. This protection rests on no legal basis and is of an anomalous

<sup>1</sup> Hall, *Foreign Jurisd.*, p. 135.

character. The protected person is not, however, removed absolutely from the action of the laws existing in the local Courts. So, in the case of *Abd-ul-Messih v. Farra*,<sup>1</sup> a Chaldean Catholic was taken under the protection of the British government, and probate of his will was granted by the Consular Court at Constantinople, but succession to his moveable property was held to be regulated by the laws which govern the successions in Turkey of his civil society—the Chaldean Catholics. The extent to which this protection is given has become more constricted of late years (*cf.* the case of the Russian Jews in Syria). When the official employment is given up the protection is no longer afforded. "*Cessante ratione, cessat et ipsa lex.*" It may be also pointed out that foreign members of a British crew are allowed to share the full protective rights in Eastern States to which their British comrades are entitled.

There are also certain special privileges which Great Britain and a few other favoured nations possess to frustrate an oppressive exercise of power on the part of the local authorities. In the States where the various Capitulations have effect, the police are forbidden to enter the house of a British subject without giving due notice to the ambassador or consul. Similarly, when a criminal is arrested *flagrante delicto*, notice must be given to his consul within twenty-four hours. In Persia a formal authority must be given by the consul or minister. In this way protection is granted to property and things as well as to persons.

A further instance of this power is given in the case of ships and boats. No arrest can be made on a British vessel in Turkish waters by local officials without the sanction of a British consul. The immunity is even larger in China and Corea. Under no circumstances can Chinese officials enter the houses or vessels of British subjects at the open ports, though it may be possible that the Chinese authorities have

<sup>1</sup> L. R., 13 A. C., p. 431.

greater licence 'in the interior. In Corea no local officer may enter house or vessel without the consent of the British consul. The British Crown, by various Orders in Council, is declared to possess the same powers over the property of its subjects on land and sea as it does over their persons. By a convention between Great Britain and the King of the Belgians in 1884, British consular officers are to exercise exclusive authority over British subjects and their property, though the latter are not relieved from their obligation to observe the laws of the Free State applicable to foreigners, and such infractions are justiciable only by British consular Courts. This does not expressly exclude the operation of police regulations.

These privileges are granted with a moral obligation on the part of the favoured nation that they shall not be used to the detriment of the nation granting them. "It constitutes a safeguard; it does not confer an immunity. It is not intended that an asylum shall be afforded to persons who have violated the ordinary territorial law."<sup>1</sup> The reason for this privilege is, that in semi-civilised countries the administration of law tends to be confused with somewhat arbitrary executive measures.

In respect of the conduct of trials various treaties have been made, whereby it is secured that justice shall be made reasonably possible by the presence of a consul or some authorised official. In Morocco, the governor or *cadi* tries all cases, both civil and criminal, in which a Moorish subject is the accused or defendant.<sup>2</sup> But the British Consul-General or his deputy has the right to be present. There is an appeal in civil cases to the British *Chargé d'Affaires* and Consul-General, and by the defendant to the Moorish Commissioner for Foreign Affairs. In Corea the treaty provides that: "In all cases, whether civil or criminal, tried

<sup>1</sup> Hall, *Foreign Jurisd.*, p. 145.

<sup>2</sup> Hertslet, *Comm. Treaties*, x, 907.

" in Corean Courts, a properly authorised British official  
 " shall be allowed to attend the hearing, and shall be treated  
 " with the courtesy due to his position. He shall be  
 " allowed, whenever he thinks necessary, to call, examine,  
 " and cross-examine witnesses, and to protest against the  
 " proceedings or decision." So in Siam he is at liberty to  
 attend and listen to the trial, while copies of the proceedings  
 are to be furnished from time to time.<sup>1</sup> In Turkey and the  
 various capitulation countries, " the judge shall not hear or  
 " decide until the ambassador, consul, or interpreter, shall  
 " be present."<sup>2</sup>

Exclusive jurisdiction is given to the consul in civil and  
 criminal cases where foreigners alone are concerned. There  
 is an exception in the case of Turkey. Where real property  
 is the subject of a suit the Ottoman Courts have sole autho-  
 rity, even though both parties interested are foreigners, the  
 immunity of their persons and personal property alone being  
 reserved.<sup>3</sup> The view of the European Powers is that the  
 jurisdiction of the Turkish Courts is confined to questions  
 regarding the title to the land itself or the right to its  
 possession or occupation. It was decided on appeal in  
*Abbott v. Abbott* (L. R., 6 C. P. 220) that an order made  
 by the Supreme Consular Court in Constantinople for the  
 sale by a receiver in partnership suit of lands, held by the  
 partner in the name of a Turkish subject, was valid. "*A*  
*fortiori* it would seem that an order for sale of lands held  
 by British subjects in their own names would be valid."<sup>4</sup>

In criminal cases there is a slight exception in Egypt and  
 also in China, where in Shanghai there is a mixed Court  
 presided over by a Chinese magistrate assisted by a British  
 consular official.

In mixed cases, where a foreigner and a native are con-  
 cerned, the proper forum is that of the accused; while in

<sup>1</sup> Hertslet, *Comm. Treaties*, x, 567.    <sup>2</sup> *Ibid.*, ii, 352.    <sup>3</sup> *Ibid.*, xx, 1214.

<sup>4</sup> Tarring, *British Consular Jurisdiction in the East*, p. 92.



cases between the subjects of two foreign Powers, the case is heard in the Courts of that party against whom proceedings are taken.

This delegated authority has been granted by treaties or is based on custom. With Japan, Corea, China, Siam, Morocco, the Congo Free State, and Madagascar, Great Britain has express treaties, and in Persia has the most favoured nation powers, so that she enjoys the same advantages as France and Russia. But in the territories subject to the Capitulations and in Muscat only civil jurisdiction is covered by the treaties, and criminal jurisdiction is founded on custom. European subjects in the employment of a foreign State are necessarily amenable to its discipline. In criminal cases, "the almost universal practice" is that exclusive jurisdiction shall be exercised "by the European State whose subject is accused.

Though Egypt is nominally affected by the Capitulations, as a part of the Ottoman Empire, recourse to the Porte is difficult if not impossible, and customary practices are in vogue different from those in Turkey. In a report on judicial reform presented by Nubar Pasha to the Khedive in 1867, it was said, "*De ces capitulations, il n'existe plus que le nom; elles ont été remplacées par une législation coutumière arbitraire, résultat du caractère de chaque chef d'agence, législation basée sur des antécédents plus ou moins abusifs, que la force des choses, la pression d'un côté, le désir de faciliter l'établissement des étrangers de l'autre, ont introduite en Égypte.*"<sup>1</sup>

In the Ottoman dominions a British prisoner, where the charge is brought by a native, is subject to a Turkish tribunal, though a dragoman from the British consulate must be present, and (in Constantinople) has to sign the sentence which is carried out by the British authorities or under their supervision.

<sup>1</sup> Lawrence, *Commentaire sur les Éléments du droit Int.*, iv, 183.

Practice in civil cases is not so uniform. In some countries, as Muscat, Corea, and Siam, the Consular Court has compulsory jurisdiction. "In China and Japan the function of the Court was arbitral, as the native could not surrender by a submission a sovereign right of his country." In the Ottoman Empire and Persia a native plaintiff can bring his suit in the Consular Court provided he produces the consent in writing of the competent native authority, though the Turkish government generally regards the ordinary Turkish tribunals as capable of dealing with mixed cases, and consequently often refuses its consent. In the Persian coast and islands there is an unconditional British jurisdiction based on usage and sufferance alone.

Where the foreigner is plaintiff, proceedings in the consular Courts are necessarily arbitral.

Foreigners are liable to arrest in these countries, subject to the limitations already described, though the consular powers are concurrent.

In protectorates, spheres of influence, and barbarous countries, the practice differs. With the two former, Great Britain generally relies on agreements with the native sovereign. So in 1888, by an agreement with the Sultan of Brunei, the State is to continue to be governed and administered by the Sultan and his successors as an independent State under the protection of Great Britain, while jurisdiction is reserved to British consular officers over British subjects and protected persons, though not over subjects of foreign States.

The State of Sarawak is still independent, and the authority of Great Britain in the State of North Borneo is extra-territorial.

European States other than Great Britain, as at the Berlin Conference of 1884-5, and by the 1st Article of the General Act of the Brussels Conference of 1890, contemplate and compel extensive interference with the internal sover-

eignty of a community, so that a commensurate assumption of authority is involved on the part of the protecting State. In a protectorate, though views somewhat differ, a protecting State is "bound to see that a reasonable measure of security is afforded to foreign subjects and property within the protected territory, and to prevent acts of depredation or hostility being done by the inhabitants."

In spheres of influence "no jurisdiction is assumed by the European State, no internal or external sovereign power is taken out of the hands of the tribal chiefs. . . . Foreigners enter the country to a great extent at their own peril."<sup>1</sup>

In barbarous countries the European Powers have the right of the stronger to protect their subjects, but this is beyond the sphere of International law.

As a country approaches more closely to the standard of European civilisation the necessity of exercising these delegated powers diminishes, and the native tribunals may have authority with greater confidence on the part of foreign Powers. The result of such an upward movement may be seen in the alteration of the attitude adopted towards Japan within the last ten years, as its Courts now have jurisdiction over native and foreigner alike, within certain limits.

The direct action of the doctrine of protection is not concealed under the guise of jurisdiction: but is openly a means of obtaining redress when legal methods have failed. When the subject of a sovereign Power has been wronged during his residence in another country, he has the right to call on his own State to take such steps as will give him reparation or freedom as the case may be. Unjustifiable arrest, slavery, compulsory abjuration of religion, pillage organised, authorised, or permitted by State officers, personal injury, and an inequitable administration of law as between native and foreigner, are all just causes for

<sup>1</sup> Hall, *Foreign Jurisd.*, p. 228.

invoking State protection. It is true that individuals are not recognised as the subjects of International law; but through the mediation of their respective States they may seek the protection so afforded.

In the case of semi-civilised or barbarous States, when remonstrance has failed, sharper methods are pursued, and constraint is brought to bear by means of punitive expeditions. So, in 1867, the King of Abyssinia was compelled to liberate some English subjects whom he had arbitrarily imprisoned. Among nations possessing a higher standard of civilisation there are recognised methods of obtaining redress, varying in the degree of coercion brought to bear as they approach hostilities.

Diplomatic representations are made through the authorised channels, and generally among European Powers, which presumably know the value of peace, success attends these efforts in whole or part. A nation does not champion one of its subjects without intending to have effectual redress, and beyond and behind the diplomatic remonstrance lies more or less concealed the threat of ulterior measures. To withdraw its claims would involve too great a loss of credit.

In cases like those above mentioned, a State has the right and duty of demanding redress or restitution, and of exacting guarantees against renewal. Should diplomacy fail, even when supported by threats of further action, it must materialise those threats and take one of two courses, either measures more or less pacific in character, yet strongly coercive, or the final arbitrament of war. It has the right to intervene and prevent the continuance of the offence. Lingelbach, in a paper read before the International Law Association, says: "States have claimed a right to intervene to enforce reparation for injury to life and property and justice to aliens." In 1904 the Nicaraguan government confiscated the property of British

turtle fishers, and a gunboat was sent to visit Bluefields. The result was successful.

Should the amount of damages or the right to receive compensation be in dispute, the question may be amicably settled by arbitration. The conditions and scope of the reference are put on definite lines by the treaty or other instrument of submission.

In accordance with this, the United States, in 1888, intervened on behalf of Van Brokelen, on the ground that the Haytian Courts unduly discriminated against him.<sup>1</sup> In 1897, in the *Costa Rica Packet Case*, Great Britain intervened on behalf of Carpenter against Holland, stating that no real cause was shown for his arrest, and that the treatment to which he was subjected in prison appeared to be unjustifiable in view of his being the subject of a civilised State. *Per F. de Martens, arbitrator.*<sup>2</sup>

If, however, this method is not adopted, or prove unsuccessful, and an amicable settlement be impossible, a State must have recourse to its right of legitimate defence. Self-preservation suspends the obligation to act in obedience to other principles, and unless a State is content to abandon its rights it must take justice for itself. The means of getting this differ greatly, but have one common feature—that of constraint.

One method is that of retorsion, *i.e.*, the *lex talionis*. "It is the appropriate answer to acts which it is within the strict right of the State to do, as being general acts of State organisation . . . which place the subjects of a foreign State under special disabilities."<sup>3</sup> It is not directed against one specific act of injustice. For example,<sup>4</sup> State A gives an undue preference to those of its creditors who are its own subjects to the detriment of foreign creditors. Then State B is justified in treating

<sup>1</sup> 2 Moore, *Int. Arb.*, 1853.

<sup>2</sup> Hall, *Int. Law*, p. 335.

<sup>3</sup> 5 Moore, 4948—54.

<sup>4</sup> Bluntschli, section 505.

State A, or the subjects of State A, in an identical or closely analogous manner. So in the case of "differential import duties." Retorsion is not too desirable a method of obtaining redress, and a State using it deliberately lowers the standard of its administration. It adopts measures which it knows are intrinsically bad, in the hope that the State giving provocation may mend its ways.

The remedy for specific wrongs is reprisal. It is a method employed by a State to make another recognise its wrongful acts by doing it some damage, the injustice of which it is forced to recognise. Such methods vary according to circumstances. M. Bluntschli<sup>1</sup> classifies them as follows :—

(a) La mise sous séquestre des biens appartenant à l'adversaire et situés sur le territoire de l'état réclamat, ou, suivant les circonstances, la constitution d'hypothèques sur ces mêmes biens ;

(b) La mise sous séquestre des biens appartenant à des citoyens de l'état avec lequel on est en conflit, et situés sur le territoire propre, lorsque l'adversaire en violation du droit international, a saisi les biens possédés sur le territoire par des citoyens de l'autre état ;

(c) L'interruption de relations commerciales, postales, télégraphiques ou autres, entre les deux pays ;

(d) Le renvoi ou l'expulsion des ressortissants de l'état étranger ;

(e) L'arrestation, à titre d'otages, des personnes qui représentent l'état étranger ou en sont ressortissants ;

(f) L'arrestation de fonctionnaires ou même de citoyens de l'état étranger, lorsque ce dernier s'est précédemment saisi injustement de citoyens de l'état qui use de représailles ;

(g) Le refus d'exécuter les traités, ou la dénonciation des traités existants ;

(h) Le retrait des privilèges ou des droits accordés aux ressortissants de l'état étranger.

These rules have, however, undergone many changes, and at the present time sequestration of the public debts of the State, as in the notorious *Silesian Loan Case*, and the arrest of foreigners as hostages, are both opposed to modern doctrines. Acts which are not permitted in war-time cannot be legitimate by way of reprisal. At the same time the

<sup>1</sup> Section 500.

sequestration of private property is an indirect and not too commendable method of obtaining redress.

In the *Don Pacifico Case*<sup>1</sup> Great Britain employed the most common form of reprisal—that of embargo. It consists in sequestering “such ships belonging to the offending State as are lying in the ports of the State making reprisal, or in the seizure of ships at sea, or of any property within the State, public or private, which is not “entrusted to the public faith.”<sup>2</sup> Nowadays, no property seized by way of reprisal would be condemned until war should be declared, and the ancient rigour has been much mitigated.<sup>3</sup> In the case of the *Boedes Lust* the attitude of the British Courts was laid down by Sir W. Scott, J.<sup>4</sup> So long as the abnormal relations exist the seizure is equivocal; if peace is confirmed the vessels are released; if war breaks out they are liable to confiscation. A legitimate reprisal must be in proportion to the injury.

Pacific blockade is another way of applying constraint. It has been general in past years, and has many modern instances. In 1884 France blockaded Formosa, and in 1893 the coast of Spain. In 1886 Greece was subjected to this, and in 1897 Crete was “pacifically” blockaded by the use of cannon.

This measure is open to question, as it is essentially an incident of war and does not solely affect the two States mainly interested. M. Bluntschli assumes that the blockade must be so conducted that third States are to have free ingress and egress for their ships; but a limited blockade of such a character is merely illusory, and the line dividing it from a belligerent blockade is extremely fine, if not invisible.

*Primâ facie* acts of reprisal are acts of war, and they differ from acts of self-preservation solely in the degree of their

<sup>1</sup> *Scott's Cases*, p. 461.

<sup>2</sup> Hall, *Int. Law*, p. 336.

<sup>3</sup> Cf. the action of Turkey at the outbreak of the Crimean war.

<sup>4</sup> Robinson, v, 245.

necessity. "A means of putting stress, by something short of war, upon a wrong-doing State is required, and reprisals are not only milder than war, since they are not complete war, but are capable of being limited to such acts only as are the best for enforcing redress under the circumstances of the particular case."<sup>1</sup> The State affected determines whether it will regard them as acts of war or not.

Should these so-called pacific means fail, there is nothing left but a direct appeal to arms. It is the last resort, when no adequate legal protection is afforded and pacific measures have failed to obtain redress. By war is demonstrated that right of self preservation which both underlies the protection given by a State to its subjects and renders all other rights subordinate.

F. B. BROOK.

#### IV.—THE LAW OF ANCIENT LIGHTS AND ITS REFORM.

FOR many years past practical men interested in building have been gravely dissatisfied with the law relating to Rights of Light. The representative societies of architects, surveyors and builders, have over and over again discussed the question:—how that law can be altered so as to bring it into unison with the requirements of modern life. So far little or no progress in the matter has been made, and any progress that has been made has arisen not out of these discussions, but out of the decisions of the higher Courts, and more especially of the House of Lords. And yet, though the practical men's recommendations are as a rule uncommonly impracticable, there is no doubt their dissatisfaction with the law is grounded on very sensible reasons. One case as to which I can bear personal testimony will be sufficient to show this.

A shopkeeper in a very growing suburb of London carried

<sup>1</sup> Hall, *Int. Law*, p. 368.



on his business in an old two-story house in the High Street. As the suburb increased in population and wealth his trade prospered, and he bought up, one after another, a whole row of houses similar to and adjoining the one in which he originally started trading. Finally, he resolved to rebuild the whole premises in a palatial style, at a cost—if I remember rightly—of something between £50,000 and £100,000. He had plans prepared, part of his original buildings pulled down, and part of the new buildings raised to the height of the old ones, when the owner of an insignificant shop next door to his premises commenced an action for an injunction. It seemed that this mean shop, which was three stories and a-half high, had a skylight in its roof, lighting a miserable garret. The rebuilding tradesman knew nothing of this skylight when he instructed his architect to design the new buildings, and could not have known of it unless he had gone up in a balloon to investigate the surrounding situation. Nevertheless the judge, on its being admitted that his new buildings, if carried out according to the plans, must materially interfere with the light to the garret, had no option but most reluctantly to issue an injunction. The result of the whole affair was, that the owner of the shop was ultimately paid £5,000 to permit the rebuilding tradesman to complete his premises. This sum, I estimated at the time, was more than twice the value of the freehold of the whole mean shop. Yet the only alternative the rebuilding tradesman had was to pay this sum or to spoil the appearance of his new premises, and get into unspeakable difficulties with his contractor as to deductions on the contract price. Proceedings like this strike the unlearned mind as blackmailing of the blackest kind. But the learned Chancery lawyer knows better. That most able judge, Buckley, J., admitted that he saw no harm in the dominant owner squeezing as much as he could out of his neighbour under similar circumstances.<sup>1</sup>

<sup>1</sup> See *Cowper v. Laidler* (L. R. [1903], 2 Ch. 337).

The law as to light, when it was originally invented or applied by the Courts, was far from unreasonable. The vast bulk of the people of England then lived in the country or in country villages. London was really the only town in the realm which we should now consider a town at all, and the law as to ancient lights applied to it only to a very limited extent. Not to go into musty authorities, the law three hundred years ago seems to have been much on these lines:—Every piece of land in its natural state was entitled to the access of so much light and air over the adjoining land as might be necessary for its reasonable enjoyment. If artificial works were erected on the land, then these entitled the owner to no greater amount of light and air than he was entitled to before, until they had existed long enough to enable him to set up prescription or the fiction of a lost grant. Even then he was only entitled to rights in respect to such artificial works similar in scope to those he was entitled to in respect to the land in its natural state—that is, the right to claim that the access of light to the artificial works should not be so interfered with as to prevent his reasonable enjoyment of them.

This state of the law was satisfactory enough when it applied only to the rural parts of England. Where land was plentiful, a person who built so as to injure his neighbour's lights, usually did so not because it was beneficial to himself, but because it was detrimental to his neighbour. And, as has been said, this power of acquiring rights of light to artificial structures did not exist effectively in the only real city in the country, that is London. And, probably, local customs similar to that of London existed in other ancient boroughs.

During, however, the last hundred years the life of the people has changed enormously, while—until lately—the change in the law of light has been the reverse of what it should have been. Formerly, the proportion of the whole

population of the kingdom which lived in towns was small; now it is a very large majority of it who so live. The law which was made for and exclusively made for a rural population, is now applied with aggravations to an urban population. The result is, that the law as to rights of light has become one of the most formidable obstacles existing to that which every well-wisher of his country desires—the improvement of the towns which are now the dwelling-places of the people of England.

The old law, as has been said, which was intended to apply to the rural districts only, has been applied to the towns with aggravations. These aggravations are due partly to the Legislature, but principally to the Court of Chancery. One of them was introduced by the Prescription Act 1832, which expressly abolished local customs restraining the acquisition of ancient light (sect. 3). The effect of this was to abolish the sensible custom of the City of London, which entitled one neighbour to obstruct by buildings another's ancient lights, provided the new buildings were erected on old foundations.<sup>1</sup> Perhaps it should also be considered an aggravation that it enacted that to prevent prescription it is not sufficient to show that the access of light was enjoyed by agreement with the owner of the land over which it came, unless the agreement was actually reduced into writing. Neighbours, when windows are opened overlooking their lands, are now, in order to preserve their lands from being made subject to an easement, reduced to the alternatives of either blocking up such windows or compelling the builder of them to enter into a written agreement to build them up where required. Both of these are regarded as very unneighbourly proceedings, and lead usually to bad blood, so much so, that neighbours on friendly terms rarely adopt either of them, with the result that in twenty or rather nineteen

<sup>1</sup> *Yates v. Jack* (L. R., 1 Ch. 295).

years<sup>1</sup> they find their lands burdened with an easement which may prevent them building upon it. And why should it be made so much easier to acquire rights over another person's property than to prevent him acquiring rights over yours? And under the present law it is sometimes absolutely impossible to prevent an adjoining owner acquiring easements over your land. If he refuses to enter into any agreement, and it is impossible to block up his new lights without interfering with his old ones, he is master of the situation. All this trouble might be easily avoided by making registration of new lights at the Land Registry sufficient to prevent prescription.

But the chief aggravations of the common law of lights are due to the action of the Court of Chancery. The very remedy which the Court of Chancery gave was itself a terrible aggravation. At Common law, when rights of lights were interfered with, the only remedy of the injured landowner was in damages. He could, indeed, enter on his neighbour's land and remove the obstruction, but that was a perilous proceeding, likely to lead to an action of trespass, and likelier still to result in a breach of the peace. The remedy in damages was no doubt in many cases ineffective. That is why persons came to Chancery to obtain injunctions instead. But if damages were an ineffective remedy in many cases, an injunction was too drastic a remedy in many others. This was felt long ago, and led to the passing of Cairns' Act, which in proper cases allowed the Court to give damages in lieu of an injunction. But that Act has failed in administration. The Chancery judges being experts in law, but not experts in valuation, have not hesitated to declare when a suitor's legal rights are interfered with, but have hesitated to assess the injury done to him, except when it is clear that injury

<sup>1</sup> *Flight v. Thomas* (11 A. & E. 688). Cf. *Lord Battersea v. Commissioners of Sewers of the City of London* [1895], 2 Ch. 708.

has been trifling. And, further, when no injury whatever has actually been done, but is merely threatened, the Court not being able to give damages, holds that it must give an injunction in practically every case.<sup>1</sup> If the person whose lights, then, are threatened applies in time, he can obtain an injunction, which very often places his unfortunate improving neighbour at his mercy. Whether *Martin v. Price* (*supra*) would be sustained in the House of Lords is another question.

Another aggravation of the Common law which has recently been set right by the House of Lords, was as to the extent of the access of light which is acquired under the Prescription Act 1832. The tendency of the Court of Chancery was to hold that the right acquired was to the amount of light which was admitted or admissible through the window during the period of prescription. Any erection which sensibly diminished this amount, whether the owner was injured thereby or not, and whether the window was in the country or in the centre of London, was an interference with this right, and must be restrained. This doctrine was mitigated by the principle—which was not one of law but one of fact—that where the obstructing erection made no greater angle than 45 degrees with the bottom of the window, there was *prima facie* no obstruction of the access of light.<sup>2</sup>

This whole doctrine has been overthrown by *Colls v. Colonial Stores, Limited* ([1904], A. C. 179). Now the Common law doctrine that there is no interference with a right of light unless the obstruction is in the nature of a nuisance—that is, renders the building less fit for use—is re-established. It would seem as if the converse of this rule, *viz.*, that the erection of buildings on land does not deprive the land of the natural right, independent

<sup>1</sup> *Martin v. Price* (L. R. [1894], 1 Ch. 276).

<sup>2</sup> *Parker v. First Avenue Hotel Co.* (L. R., 24 Ch. 282).

of easement, to a reasonable access of light and air, would have been re-established too, had the House of Lords given judgment in *Chastey v. Ackland* (L. R. [1897], A. C. 155).

In whatever way the present state of the law has come about, it is clear that it cannot be set right by mere judicial decisions, even by a tribunal so powerful and courageous as the House of Lords. Legislation is necessary, and the legislation, in my opinion, should be (subject to what is above said as to registering new lights) more in the direction of improving the administration of the law than of improving the law itself. The failure of Cairns' Act shows that a Chancery judge feels his unfitness to decide matters which are really to be decided properly only by building experts. Why then should a special tribunal, such as that created under the London Building Act, not be created for the trial of these cases which, in three cases out of four, involve no point of law? Such a tribunal should have powers not merely to enjoin or give damages in respect of interference with light, but also of approving arrangements and alterations in building projects which would reduce the interference to a minimum. For instance, it should be entitled to take into consideration, in coming to its decision, that the obstructing owner had undertaken to face his building with white tiles and to maintain such facing. It might also, of course, have the power to reserve any point of law for the decision of the Court itself. If, however, there is any sufficient objection to the creation of a tribunal of experts with a legal assessor, at any rate, judges trying such cases should be allowed an assessor who is a building expert. Without such a reform no alteration of the law itself can be satisfactory, since the ordinary Chancery lawyer, from the mere examination of plans and the evidence of architects, is quite unable to say for certain, what, in fact, will be the effect of any alterations proposed. This can be done by none but a person practically familiar with

such matters, and without the assistance of such a person, no reform of the law will in actual administration prove more effectual than has Lord Cairns' Act.

J. ANDREW STRAHAN.

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## V.—THE ABOLITION OF THE PROFESSIONAL CRIMINAL.

THE professional criminal has, for some reason or other, come to be regarded as one of the insoluble problems of modern civilisation. He is looked upon as an intolerable nuisance, and if not a short shrift, at any rate no mercy, and certainly no humanitarianism, is the policy that the public mind has been led to believe is the only effective means of dealing with this social pest. Extermination has been strongly advocated as not only the professional criminal's due, but also the only safeguard of society against him. Self-constituted psychologists have asserted, in spite of the experience of many centuries to the contrary, that what are called criminal instincts, by which they apparently mean criminal practices, are hereditary, and that, accordingly, the criminal, like the lunatic, epileptic and habitual vagrant, should be rendered incapable of propagating his species, the easiest means to that end being to hurry him out of existence. One fatal objection to this drastic remedy is that it is not quite as easy to ear-mark the criminal as the lunatic. The latter can scarcely avoid placing himself in evidence, while the former not only can but frequently does. Indeed, some cynical persons aver that the criminal *in excelsis* develops a particular aptitude for covering up or obscuring his misdeeds, and that it is only the bungling, inartistic criminal who gets labelled as such, and with whom society is asked to deal. Manifestly, the former is far more dangerous. This is,

however, by the way, though the fact points to the necessity for exercising caution in regard to drastic panaceas for dealing with criminals, when these doctors really only mean convicted or detected criminals.

As I have said, the public mind is beginning to come round to the view that stringent steps must be taken in reference to the professional criminal, not because the public mind has thought the matter out for itself or investigated deeply, or indeed at all, the various difficult questions that ought to be thoroughly investigated before any determination is arrived at on such a subject. The public mind has reached its conclusions in the matter, not by any abstruse process of reasoning, but solely in response to the persistent clamour and continued dogmatic assertion of self-constituted authorities. "Authorities" is a word that I always find difficult of comprehension. What constitutes an "authority?" Who has so constituted him? are questions to which I invariably desire an answer before placidly accepting the *dicta* and dogmatic utterances of "authorities" who are often self-dubbed. What, may I inquire, constitutes an "authority" on the subject of the proper treatment of criminals, professional or otherwise? Why should an ex-police officer, or an ex-prison official, or an ex-judge, be deemed to be an authority merely because he declares himself to be such? These persons as a rule look upon professional and other criminals from a purely official standpoint. Their lives have usually been spent in investigating or punishing crime, and they too often regard crime and criminals very much as a dog regards rats or a cat mice. If it were possible to obtain the opinions of dogs and cats generally they might be valuable, and they would certainly be interesting on many matters, but on the subject of the best method of dealing with cats and mice respectively their opinions would assuredly be looked at with a considerable degree of suspicion.



Some of the people I have referred to, and indeed many right thinking and well-meaning persons, affect to regard crime as a species of disease impossible to eradicate once the criminal virus has inoculated the system, whether by heredity or contagion. Any man who has had the unhappiness to have been in gaol, and has subsequently attempted to obtain employment, has not been long in discovering that he is presumed to be suffering from a sort of moral leprosy, incapable of cure, which renders him perpetually unclean and everlastingly addicted to a return to wallow in the slough of crime of some or any kind. This view of the matter to any person who has incurred the censure of the law always appears, always must appear, where it is not, as it sometimes is, the mere outcome of canting hypocrisy, the height of injustice. Such a man looks round the world—the unconvicted world—and well, he thinks things. If he be ultra-charitable, he wraps his thoughts in some such verbal covering as the late Sir J. F. Stephen eloquently expressed when he wrote: "Make criminal law so severe as to hang everyone who systematically follows his own private interest and systematically ignores the interest of all the rest of the world, and you would turn the world into one vast place of execution. Law proper is of very subordinate importance and of necessarily diminishing importance as a moralising agent. It can only restrain people from gross and stupid offences which no bad man of the least ingenuity would ever desire to commit."

I am quite as sensible as any man can be—perhaps more sensible than most persons are—of the advisability, from every point of view, of abolishing the professional criminal. I believe him to be not only a danger to the community, but, as a person who produces nothing, from an economic point of view useless. I am sensible of the desirability of abolishing crime as a profession, but I entirely join issue with the proposals that have been put forward for the purpose of

bringing about that consummation by a certain school of doctrinaires, of which Sir Robert Anderson may be taken as a prominent representative. These gentlemen propose to abolish not crime but the criminal. They aspire to do this by locking up all the English thieves, a result which would, at any rate, make England a dumping ground for the foreign article. This latter fact does not appear to have struck them. I believe that Sir Robert Anderson and the school he represents are absolutely wrong-headed in reference to the drastic measures they put forward. They have, or affect to have, no difficulty whatever in the matter. "Behold," they in effect say, "the criminal, the enemy of society, you can do nothing with him, he is a wild beast when at large, and as such, will act according to the instincts and the predatory habits of a wild beast. To put him out of existence would really be kind to himself and a blessing to the community, but as certain mawkish sentimentalists, more noisy than numerous, make such a hubbub about extermination, let us at least perpetually cage this dangerous animal." And hence the Bill introduced by the Home Secretary last Session, the object of which was stated to be to enable the judges to effectively deal with prisoners who, when at large, persistently lead a life of crime, and in regard to whom ordinary sentences had failed to have a deterrent effect. Should this measure ever be passed into law, prisoners who have been previously convicted at least three times are to be considered as professional criminals, and as such they are to be "segregated" (what an excellent phrase) for long periods. This is in part Sir Robert Anderson's scheme as frequently put forward in print. It will no doubt, if eventually passed, be accepted as an instalment on account, and its failure—for I predict it will be a failure—to abolish or indeed diminish professional criminals will, probably in due course, be urged as a plea for the more drastic measures previously suggested.

Sir Robert Anderson and his school will not for one moment allow that there are any difficulties to speak of in dealing with the professional criminal. Persons who think otherwise are somewhat rudely swept aside as "humanity-mongers" and so on, and motives are imputed to them which sometimes appear to be a trifle uncharitable. I shall not in this article follow such an example. I am ready to admit, inasmuch as I fully believe, that most of the advocates of a drastic method of settling the professional criminal are sincere. At the same time, I am equally of opinion that their plan is inhuman, unchristian, impracticable, and if attempted to be put into practice would prove extremely expensive. Some persons may say that, after all, this is merely an opinion, the opinion too of an ex-prisoner, and as such that it should be regarded with considerable suspicion. Criticism is, I know, always easy, and I should not have taken up my pen to indite this article had my intention merely been to criticise the proposals of Sir Robert Anderson, and those persons who are of his way of thinking, in reference to the treatment of professional criminals. Destructive criticism of a plan proposed towards any desired or desirable end always seems to me to be more or less futile, unless the criticism be accompanied by a suggested alternative. That is what I propose to put forward in this article.

I have admitted that the professional criminal is a fact. How is he to be got rid of?—Can he be got rid of?—are questions which may very well be asked. As a preliminary to answering such inquiries, may I be permitted to put a question? Why does the professional criminal exist? Why should there be a class of men who live a life of crime as a means of livelihood, as a profession in fact? The profits are certainly not great, the work, of whatever kind it be, can hardly be regarded as pleasant, the risks are terrible. Some writers, I know, assert, on no evidence

whatever, that the professional criminal is such simply because he is innately vicious, that he loves crime for the sake of crime, and that the risk of detection and consequent loss of liberty for many years add the zest of danger to his lawlessness. I shall not attempt to refute such a preposterous proposition. I myself do not believe it, and my belief is founded not on a mere personal opinion, or a wish to believe, nor is it the outcome of some specious theory drawn from the recesses of my own mind and built up on the flimsy foundations of an exuberant imagination. I speak from personal knowledge of professional criminals, and, I may add, from that bitter personal experience which, I believe in my heart, induces or forces many men not naturally vicious to become professional criminals. I think, in my experience of professional criminals in gaol, and in the course of conversations in which there is neither time nor inclination for artificiality, and of which terseness is above all a characteristic, I can safely say I have never met a man of this class who did not loathe his profession, and did not regard a return thereto as an unpleasant necessity. To portray these men, as they have been portrayed, as revelling in their infamy and wholly dead to good influences or efforts of any kind, shows, I venture to assert, either a colossal ignorance or a blind stupidity. The professional criminal very frequently becomes, and almost invariably remains such, because it is the only profession open to him. He has been made, is regarded, and is treated as a social pariah, and, such being the case, he cannot well be anything else. I do not, I cannot, defend on high moral grounds his return to wallow in the mire. I admit it would be in many respects more admirable were the man, on discharge from gaol, to elect to starve rather than break the law, but I submit it is unfortunate that practically his only alternative should be one of constant lawlessness or an empty stomach and ill-clad body. I know that the fact of this sole

alternative is disputed, and not only disputed but strongly denied. Well-meaning people believe—and they can hardly be blamed for believing, since they are constantly being told—that not necessity but natural viciousness induces so many men who have fallen into crime to continue criminals, and, in due course, to qualify for the adjective, “professional.” Indeed, the champion of the policy of exterminating the professional criminal, Sir Robert Anderson, has expressed himself in this matter with no uncertain sound. For fear of misrepresenting his opinions, I shall quote his words. Here they are, as taken from an article in the *Nineteenth Century* for December, 1901 :—

“The question is often embarrassed by a generous feeling of sympathy for discharged criminals on account of the supposed difficulty of their obtaining employment, and in the case of men of education or social position such sympathy may often be well deserved. But in London, at least, no member of the working classes who, on discharge from prison, really desires to return to honest labour need fail of his good intention through want of a helping hand. Of course every rule has exceptions, but, speaking generally, it may always be assumed that any discharged convict who whines about police persecution and his inability to find employment, merits the persecution and not the employment. The Convict Supervision Office is always as ready to befriend the deserving as to ‘persecute’ the evil doer, and nothing at Scotland Yard used to give me more satisfaction than the administration and development of the system established by my friend, Sir Howard Vincent, for this purpose : and to many an appeal made to me to help some poor fellow on his discharge from hospital or the workhouse, I had to make answer, ‘If he had been discharged from gaol I could help him, but I cannot help a man merely because he is poor and unfortunate.’”

Now, I hope I shall not be accused of regarding what is undoubtedly a grave subject in a frivolous spirit, if I say that, when I read the aforesaid pronouncement of Sir Robert Anderson, it occasioned me no little amusement. Most decidedly at the time my disposition was neither frivolous nor conducive to feeling amused. I was, as a matter of fact, in what I presume Sir Robert Anderson would deem the whining stage, only I did not whine. I was at the moment a discharged convict seeking to find employment and seeking in vain. I was suffering under those disillusion and disappointments which are

most difficult of all to bear—the discovery that so many, if not all, of one's friends are of the fair weather kind, and in the day of trouble are wont, like the Priest and the Levite in the parable, to “pass by on the other side.” I was suffering, what is more, from an empty stomach and an ill-clad body. I do not relate these facts for the purpose of courting sympathy. I only state them in order to show that I was in a condition both of body and mind in which the prospect of any employment, however distasteful, would have been welcome, and yet Sir Robert Anderson's assertion that the Criminal Supervision Department at Scotland Yard was “always ready to befriend the deserving” ex-prisoner did not for one moment suggest to my mind that an application to that particular department would, temporarily at any rate, solve the difficulty that faces any man who attempts to live and move and have his being on an empty purse and no prospects. Even now that I am no longer in that parlous condition, Sir Robert Anderson's statement appeals only to my sense of the ludicrous. Did he, can he, seriously believe that any ex-prisoner, however desperate his plight, would wend his way to the Criminal Supervision Department in quest of employment? The very name is scarcely encouraging, to put it mildly. To read Sir Robert Anderson's remarks at the conclusion of the paragraph I have quoted, one would really suppose that the royal road to receiving assistance and a helping hand, when down in the world, is to be an ex-prisoner. “The poor but honest man who has just left hospital or the workhouse,” in effect, says Sir Robert Anderson, “cannot be assisted, his honesty does not qualify, in fact precludes, him. Were he only an ex-gaol bird assistance would be poured in on him. Those ex-prisoners who maintain the contrary are whining hypocrites who deserve to be persecuted.” Is this the fact? Is it any approach to the fact?

I am strongly averse to any person who writes on a

subject of public importance garnishing his criticisms or observations with personal detail. There is often the danger when so doing of attempting to grind a private axe. Even if this be not attempted, there is the risk of its being suspected, and the almost certainty of the writer being accused of it. But as, after all, an ounce of practice is worth a pound of theory, I propose to cite a few facts drawn from my personal experience, partly to demonstrate the fatuity of Sir Robert Anderson's statement, but chiefly in support of the subject-matter of this article—the gist of those observations being that the present attitude of the public—I will not use that vague expression “the world”—in regard to men who have the misfortune to have been in gaol, is the cause, in nine cases out of ten, of those men—call them gaol birds if you please—reverting to crime and, in due course, becoming recruits for the professional class. And I am going to urge that a change, a drastic change, in the attitude and in the sentiments of society and its action towards the ex-criminal, as I should prefer to call the ex-prisoner, is the very best means, and a most effective means too, in the direction of stamping out the professional criminal. I believe in my heart that a trial of these means would quickly obviate the necessity of considering the extreme proposals of well-meaning persons of the school of Sir Robert Anderson. On release from prison I found myself in possession of the certainly not magnificent sum of £4. 12s. 6d., the “gratuity” earned during incarceration. This gratuity, for some not very obvious reason, is only paid through a Prisoners' Aid Society, and in order to obtain it it is necessary to join one of those societies. I accordingly joined the Church Army Prisoners' Aid Society, only to find that the society apparently put difficulties in the way of my at once obtaining the aforesaid gratuity, by claiming the right to dole it out when and how it pleases. I confess that I thought the attitude generally of this Discharged

Prisoners' Aid Society to a discharged prisoner somewhat peculiar. My letters to my quondam friends applying for some assistance were received with absolute silence, save in one instance. In this case, my former "friend" sent my letter to the Charity Organisation Society, and I was invited to call at one of their branch offices, an invitation I declined. I replied to an advertisement which appeared in several of the daily papers, for an Editor for a well-known Peerage. A certain amount of heraldic knowledge was required for the post, and this I happened to possess. I obtained the appointment, and held it for about three months. During that period my employers expressed themselves from time to time in highly eulogistic terms respecting the manner in which my duties were performed. I was congratulating myself on having dropped into a comfortable post, the duties of which were congenial, when one evening, on return to my lodgings, I found a letter awaiting me in which I was informed that certain facts connected with my past having been brought to the notice of my employers, I "probably should not feel surprised" at receiving notice of instant dismissal. No offer of compensation or remuneration was made in this letter, and it was not until I had instructed a solicitor in the matter that I succeeded in obtaining redress. I was once again stranded, but I took heart to myself, because a short time previously I had read the speech of a well-known gentleman connected with the London literary world and interested in several journalistic ventures. This gentleman at a meeting of some prisoners' aid society, had waxed exceedingly eloquent as to the duty of "the World" holding out a helping hand to ex-prisoners, with a view not only of materially assisting but also of giving them heart to resist the temptation to which they might be exposed, penniless and forlorn as they were. I wrote him two letters laying bare my condition and my past, and asking his assistance



in the shape of employment which, I may say, at the time he was in a position to give. He never answered my letters. But why need I go on? It were useless and it would be painful for me to narrate in detail the rebuffs, insults, annoyances which fell to my lot, as no doubt does to that of every ex-prisoner. If every man's hand is not against the discharged prisoner, every man's tongue certainly is. He has no chance as the world is to-day unless he be a man of extreme courage, fierce determination, and unquenchable zeal. On the other hand, the path that leads to crime is not blocked to him. No man who has been in a convict prison can walk through the streets of the Metropolis for a week without encountering ten or a dozen men he has met in "the academy," as a convict prison is euphemistically termed by its former inmates. They, of a certainty, will not turn their backs on him or pass by on the other side. They regard him, willy-nilly, as one of the fraternity leagued against the world, and if he wants a "job" they will provide him with one. I am not speaking from hearsay in this respect but from my own personal knowledge. That knowledge does not induce me to wonder that so many ex-prisoners revert to crime; it causes me, on the contrary, to feel surprised that such a large per-centage have the moral courage to flee from temptation, and undergo the woeful experience which is the lot of so many men who have undergone imprisonment.

Why should these things be? Is it fair, is it wise? Let me put the matter in as blunt a way as possible. I have broken the law, I am detected, convicted, and sentenced to a term of penal servitude. Why, when I have completed my punishment, should the fact always be thrown in my teeth? It seems to me that as I have incurred a debt to the law and have discharged it I am entitled to a receipt in full. But no. The fact, not of having incurred the debt but of having paid it, is to be brought up all my life as

against me and—here is the grimmest irony—very frequently cast in one's teeth by men who have incurred the debt but have succeeded in evading payment of it. Some people may urge that there is over much sentiment about this. They will tell you—I have been told myself—that every man has a right to select his associates, and that if people choose to give the go-by to persons who have been in prison they are justified in doing so. In one sense I admit this, but at the same time I would urge that, placing sentimental considerations on one side, the existence of the professional criminal largely depends on the attitude of society to the ex-criminal before he becomes a professional. A considerable amount of rhodomontade is spoken and written upon this subject. No man, I repeat again—and I wish to emphasise the fact with all my power—is a professional criminal from choice. In nine cases out of ten he is driven to become such because every other avenue of existence is closed to him. It is easy for men like Sir Robert Anderson, who have never known what it is to be cold, and wet and hungry, and at the same time to have empty pockets, to talk about “whining.” Any man who has experienced the aforesaid deplorable conditions will, I think, be less harsh and uncharitable in his views and assertions.

We live in an age of cant, and, as I think, in an age wherein hypocrisy is rampant. We live, too, in a country overflowing with societies and charitable institutions whose *raison d'être* is to mend, reform, and convert everything and everybody except the ex-prisoner. He is nobody's child apparently, no one is interested in him, except the police and the Bench. And yet, I believe, in my heart, that no finer field exists for the efforts of a few good men and women than in the direction of aiding and assisting those persons, male and female, who, having been in gaol, are tacitly concluded to be outcasts whom society is justified in cold-shouldering and elbowing out of its way. And by

aid and assistance I do not altogether mean monetary or material aid. These are of course often necessary, but, above and beyond them, is requisite that personal service that proffering even if only a cup of cold water in a tender and considerate spirit. If there were only—I will not say a society—a dozen men and women in this country imbued with some such spirit as this, who would set about their task with zeal and discretion, I believe they might do a colossal work. Let it be recollected that, not only the bodies and the bodily wants, but the spiritual necessities of these ex-prisoners are in question. As things are, the world makes easy and rapid their progress to perdition. Society makes them *hostes humani generis* and then girds at them for being such. Society has, I contend, a moral obligation in regard to them which cannot be got rid of by mere denunciation or hunting them down. In my opinion, the professional criminal is for the most part a manufactured article, and I believe that when the causes which produce him no longer exist, the supply will rapidly diminish. For this reason and to this end I have written this article. So long as the attitude and tone of the public to ex-prisoners is as it is to-day, the professional criminal will remain a disgrace to our civilisation, a menace to property, a terrible expense to the public. He cannot be extirpated by being shut up, because the manufacture of new professionals will go merrily on so long as the community, in its unwisdom, and, as I think, in its hypocrisy, affects to believe that a man who has been in gaol is *ipso facto* henceforth debarred from all honest employment.

H. J. B. MONTGOMERY.

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## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### The Capitulation of Port Arthur.

THE terms of the capitulation of Port Arthur (January 2nd), are in compliance with modern international practice, and satisfy the anticipation that a gallant resistance would receive sympathetic recognition from the victors. Public and private property are carefully distinguished. The former—"forts, batteries, warships and other ships, books, arms and ammunition, and horses and all materials, all Government buildings, and all objects belonging to the Government"—is required to be transferred in its existing condition and position until otherwise arranged; and it is specially provided that if the Russian naval or military authorities are deemed to have destroyed them, or altered in any way their condition as existing at the date of the compact, the negotiations may be annulled. The latter—private property—so far as "necessary or directly necessary for the maintenance of life," is allowed to be retained by both officers and privates. The officers may return home on parole, while the non-commissioned officers and privates, and it seems the civil servants, remain prisoners of war. The Russian hospital service is retained by the Japanese for attending on the sick and wounded prisoners under the direction of the corresponding Japanese service, while the treatment of residents, the transfer of the materials of civil administration, and the details of the convention, are reserved for a supplementary compact.

A question has been raised whether the destruction by the Russians of their ships of war, which it is alleged took place after they had made overtures for surrender and had been granted an armistice, was justifiable or *bonâ fide* considering the terms of surrender, which, as cited above,

provide for everything being left *in statu quo*. The effect of an armistice—whether granted for the purpose of negotiation, or such other purpose as burial of dead after a battle—upon the rights of the belligerents *inter se*, is a question on which jurists are not at one; and the Hague War Convention leaves it to the parties to settle in each particular case, not laying down any rules more explicit than that an armistice suspends the operation of war by mutual accord, may be general or local, and if violated by one party may be denounced by the other, but not if violated by an individual, when it stands, but the offender is punished (Articles 36—41): and with regard to capitulations it only requires that they shall be in accordance with military honour and shall be strictly kept (Article 35). There is no doubt that under an armistice no aggressive act can be done by either party; but the older writers extended this to include acts which but for the armistice a belligerent could not do without interruption if hostilities had continued, *e.g.*, besiegers cannot extend their works, and a besieged force cannot repair their walls or build new ones or bring in reinforcements. (Vattel (Chitty), 408; Halleck, ii, 314; Phillimore, iii, sect. 116; *Manual of Military Law* [1899], 300: and Calvo and Bluntschli favour the same view.) Modern opinion inclines to a more liberal view, and would allow belligerents to do anything which is not an offensive act against their enemy, *e.g.*, drilling or preparing for or against attack and recuperating their forces, even including provisioning a besieged fortress. It will be remembered that in the siege of Paris in 1871, Bismarck refused to allow the entry of provisions during an armistice (Taylor, 514, 516; Merignuac [1903], 115). The latter view on the whole seems preferable, as more in accordance with the meaning of the word “armistice,” and easier to ascertain than the vague term act “capable of interruption.” These considerations, however, are not quite applicable to the destruction of property not

done for belligerent purposes, but merely to destroy its value to the enemy—which seems a question purely of *bonâ fides*.

According to an eminent modern jurist (Taylor) capitulation carries with it a tacit agreement not to destroy or alter the condition of the works or munitions surrendered, though nothing prevents a commander when capitulation is inevitable destroying everything beforehand to minimise the success of the enemy, as was done by General Page at Fort Magee in 1865, in the American Civil War, or as the French did at Almeida in 1811 (Taylor, 516); and to these may be added the action of the Dutch admiral at Sourabaya, in sinking his ships when surrendering to Admiral Pellew in 1810 (Halleck, ii, 310, citing James, *Naval History*, iv, 358). It seems, however, to be implied in an offer to surrender that it takes effect on the footing of the *status quo* at the time of the offer, and the Japanese seem to have intended to provide for this in the terms above cited.

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Another question of some interest to ourselves in connection with the passing of Port Arthur to the Japanese, is whether it affects our own tenure of Wei-hai-wei, which by the terms of the Anglo-Chinese Convention regulating it was to be coterminous with the lease of Port Arthur to Russia. Unless, which is not to be expected, the Japanese restore Port Arthur to China, it does not seem that our lease of Wei-hai-wei is legally affected, as the lease of Port Arthur is not determined by its assignment to another Power: and the value of the place to us as a naval base (pointed out in the *Fortnightly Review*, April 1904), does not make it likely that our Government will abandon it for practical reasons.

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### **The Baltic Fleet Inquiry.**

The unfortunate encounter of the Russian Baltic Fleet with our own Hull fishing fleet in the North Sea on October 21st last, resulting in personal injury (in two cases fatal) to

several of the fishing crews and damage to many of the vessels, has at least one redeeming feature in the striking consequence it has produced. Two leading Powers have agreed to refer to arbitration a question raised suddenly under circumstances of a peculiarly provocative nature, and thus to extend judicial methods of settlement to a case of Criminal International law. Under the Convention signed November 25th last (*Treaty Series*, No. 13, 1904), the two Governments agree to entrust to an International Commission of Inquiry, under Articles 9 to 14 of the Hague Convention, the elucidation of the facts connected with the incident, the Commission consisting of a naval officer of high rank of each of the navies of the two parties, and of the navies of France and the United States, with a fifth member representative of the Austrian Navy, each party being also represented by a legal assessor to advise the Commission. Admiral Sir Lewis Beaumont and Sir Edward Fry have been appointed as the British representatives, and the Commission has begun its labours. Its duty is defined to be that of inquiring into and reporting upon all the circumstances, and particularly on the question where the responsibility lies, and the degree of blame attaching to the subjects of the two parties in the matter. It determines its own procedure, and both parties undertake to supply the inquiry with all the means and facilities necessary to enable it to acquaint itself thoroughly with and appreciate correctly the matters in dispute: the decision of the majority governs, and all the members must sign the report which is to be presented to the two parties: each party bears its own cost of the inquiry previous to the assembling of the Commission, and the expenses of the Commission are shared equally between them. The inquiry already made for the Board of Trade by Admiral Sir Cyprian Bridge and Mr. Butler Aspinall, K.C., into the nature and amount of the damage caused by the incident will be the basis of compen-

sation payable in the event of the fault being found to lie with the Russian Fleet. The condition that all the Commissioners are to sign the report is no doubt intended to prevent the report being weakened by any abstention or dissent, as has been the case in several international arbitrations, *e. g.*, that of the *Alabama* in 1872, and also of the Alaskan boundary in 1903. Though the Commission is to determine its own procedure, no doubt the lines of the procedure under the Hague Convention will be followed as far as is possible in a case so different from the ordinary question submitted to arbitration. The opinion has been expressed that the Convention should have provided expressly for the punishment of the guilty persons by their government: but no Power can be expected to allow this duty to be delegated to any but its own authorities: and the inclusion of such a condition is unnecessary, when it is remembered that nations and not individuals are parties to international questions, and the duty of the guilty party making proper satisfaction is implied in the very fact of the reference.

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### Personal Penalty for breach of Blockade.

It has been said that the Japanese Government contemplate submitting to an international legal conference after the present war, if it does not itself take action on its own initiative during the war to that effect, the proposal that breach of blockade shall be treated as a belligerent act, and the officer in charge of a neutral ship so offending shall be made a prisoner of war, in addition to the condemnation of the ship and cargo. It is certainly true that the latter penalty does not deter neutrals from undertaking an operation which from the neutral's point of view is, if a risky commercial enterprise, still a legitimate act of international trade, but which is often highly prejudicial to the blockading belligerent, and directly affects the success of his



operations. It is suggested that blockade runners should be assimilated to disguised persons conveying munitions of war into a besieged fortress, and be liable to be treated as spies (*Standard*, Jan. 4th). It is true that the idea of personal punishment for breach of blockade was upheld by former writers: and it had some support in practice in the early part of the American Civil War. But it was afterwards explicitly laid down by President Lincoln, that the crew of a captured neutral vessel, or any other subject of a neutral Power on board such vessel, must not be detained as prisoners of war or otherwise, except the small number necessary to give evidence in the Prize Court: and a similar prohibition was issued against the release of the crew of a captured blockade runner being granted only on their signing an engagement not to repeat such acts (1863 and 1864). In the Spanish-American war of 1898, specific instructions were given to blockading cruisers that the crews of blockade runners are not enemies and should not be treated as prisoners of war. In the present war both belligerents have followed this rule: and modern opinion treats confiscation of property as the sole penalty enforceable (Calvo, 1885, Dict., *Blocus*).

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In an interesting paper read at the St. Louis Conference of September last, Professor C. N. Gregory, of Iowa University, cites these authorities with approval. The other question dealt with in these Notes in the last number (pp. 77—84) arising out of the present war, viz., the Russian definition of contraband, the seizure of the *Reicheltefni* by the Japanese in the harbour of Chifu, and the sinking of the *Knight Commander* carrying contraband, are discussed in the same paper, and Professor Gregory concludes in a sense favourable to Russia on the second and third points, but unfavourable on the first. He prefers the views of the Russian Prize Court with regard to the destruction of the

*Knight Commander* (which was the subject of a protest by our Government), as more just and reasonable than that of Lord Stowell, which is followed here as also apparently in the United States (Taylor, 786): and he is of opinion that in case of necessity a belligerent must have the right of destroying such property, the crew and ship's papers being preserved, and the question of prize or no prize being adjudicated as if the ship had been brought in. A circumstance of some weight in this connection is, that the Russian Regulations of 1895 giving this power were not protested against by any other Power; though this is not conclusive, as most governments prefer not to raise such questions till it becomes necessary to do so by the logic of facts. The United States, in their Regulations of 1898, claimed the same right. It is, however, a strong argument in support of the soundness of the older doctrine that the Appeal Court of St. Petersburg has reversed the decision of the Vladivostok Prize Court, in the similar case of the German steamer *Thea*, sunk for a similar reason, declaring this to be unjustified, and it is understood that the Russian Government has paid compensation for the destruction of the *Knight Commander*.

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### Foreign Enlistment.

The provisions of the Foreign Enlistment Act have been lately called into play in the cases of the *Caroline* and the *A. Menzell* (*White Paper*, Misc. No. 2, 1904). In the former case a vessel was sold by a British ship-builder, after giving notice of the proposed sale to the British Admiralty, to a British subject, from whom she passed to the Russian Government. In the latter case the Foreign Office ordered the Collector of Customs at Cardiff to detain a German ship taking in a cargo of coal there, which there was reason to believe was intended to be delivered to the Russian Fleet at sea, as had been the case with a previous

cargo. The machinery for working the Act is generally recognised as cumbrous and slow in initiation: and it seems to be by no means generally known that the proper Government Department to be consulted or take action under it is the Foreign Office, and not the Admiralty or War Office. It has been suggested that a properly constituted Court (instead of the Secretary of State) might be a much more effective instrument for this purpose during a war in which England is neutral, similar to the Prize Court in a war to which England is a party: and there would seem to be no objection to a procedure by which it should be obligatory on parties to a sale of ships to give notice to such Court and to the Consuls of the belligerent States, on whose application the ship could be detained till the Court had by inquiry satisfied itself that no breach of neutrality is involved. But the Admiralty Court already has jurisdiction to adjudicate in these cases, and to order the arrest of ships under the Act as part of its ordinary jurisdiction (sect. 21 of Act of 1870): and if this power of the Court were more often invoked at the outset, and the procedure of arrest was thus throughout the same as that in ordinary civil cases, it would be possible, without any legislative change, to bring the Act into more familiar use, and the Foreign Office would be discharged of a good deal of its present responsibility by representatives of the belligerent Powers being given greater freedom of action. Many of these difficulties would be met if uniformity of practice in the matter of neutrality could be obtained between different nations. As it is, the dividing line between sale or carriage of contraband to foreign belligerent consignees as part of general trade, and the same when made to foreign belligerent forces direct, is in practice very indistinct: and while on the one hand that distinction must, it seems, be maintained, yet at the same time all neutrals should be placed by their respective governments on the same footing in

trade in contraband. Some agreement should be obtainable in this matter which would put an end to the distinction between "benevolent" and "strict" neutrality, by all nations adopting uniform rules of practice. The process of coaling the Baltic Fleet in its voyage to the East illustrates the various interpretations which different nations put on the term neutrality.

The present war has produced the usual litigation between owners and crews of ships carrying contraband, as to what justifies seamen in refusing to continue their voyage to a belligerent port. In the case of the British ship *Agincourt*, which sailed from Barry Dock for Hong Kong with a contraband cargo, and was afterwards ordered to go to Nagasaki, the crew, who had signed for a voyage of two years and to keep within the parallel of 75° N., have been held justified in refusing to continue the voyage from Singapore, and recovered their wages and cost of return home from the shipowners.

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### The Nobel Peace Prize.

The yearly Nobel Peace Prize, of the value of nearly £8,000, has this year been awarded to the Institute of International Law. This is the first time that a body however distinguished, has received it directly, though no doubt in previous cases the award of this distinction to distinguished individuals has resulted in a similar ultimate destination. Among legal associations that work for peace by means of international arbitration, and suggestions for international agreement both in public and private International law, the Institute admittedly holds the foremost place for a continuous output of work, to which the most eminent jurists of every country have contributed. From the choice made by the trustees, it must be assumed that associations, no less than individuals, are within the purview of the Nobel Trust; but, *prima facie*, it would seem more fitting on many

grounds to reward individuals who have worked for the advancement of international concord at the cost of continuous personal labour, and often heavy personal expense, in preference to bodies, however eminent and disinterested, which are often more vigorous for not having too much financial support. The Institute, however, if any, may claim an exception to the ordinary rule in its rôle of an unofficial college of International law, and a recruiting ground for the International official panel of the Hague Tribunal.

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### **The Juridical Existence of Foreign Companies.**

The Anglo-Russian agreement of December 29th last, by which joint-stock companies and other commercial, industrial, and financial associations, domiciled in either country and validly constituted according to its laws, are mutually recognised as having a legal existence and capacity for litigation, follows the same lines as the British commercial treaties with France, Belgium, Germany, Greece (for Ionia), Spain, Tunis, and Austria (for insurance companies), (Foote, 127 note): but (like that with Germany) it does not, with an exception to be presently noticed, enable such bodies to carry on business on different conditions from those previously existing, and in Russia they require official authorisation for that purpose. The same rule prevails in many other countries as regards both questions; but in many cases treaties have assimilated foreign corporations to native ones. In France, till 1857, foreign companies were recognised by the Courts but not by the Executive: since then all such bodies authorised by their respective governments can litigate in France, if their country has been brought by executive decree within the scope of the French law.

Authorisation is similarly required in Germany, Norway and Sweden, Greece, etc., and Luxemburg (except for

Germans): it is not required in Belgium and the Congo State, Denmark, Holland, Spain and Portugal, and Austria-Hungary. Certain systems also require foreign corporations to appoint an agent domiciled and resident in the country to represent them for legal purposes (so France, even perhaps for British companies, Russia, Turkey, Austria-Hungary, and several of the American States (Weiss, 462). Unrecognised companies can only litigate as individuals or agents; in France they can be sued as a *société de fait*, but cannot themselves sue; and in Germany they are treated as companies so far as possible (C. C., s. 54 (2)). In Great Britain it is well known that foreign corporations have from the earliest times been assimilated for most purposes to native ones. This has been said by high authority (Westlake, s. 306) to be a measure of exceptional liberality; and in Canada there have been judicial *dicta* that foreign companies have no such right at Common law (Foote, 127). At this later day, however, in view of the co-extensiveness of a liberal private international jurisprudence with the interests of international commerce, it seems preferable to regard it rather as a timely recognition by English judges of a principle which is as vital in law as in commerce to a great mercantile nation, namely, to make no distinction between natives and foreigners. The majority of jurists have taken the same line, that a foreign jural person should be recognised ex-territorially; and in 1891, at Hamburg, the Institute of International Law resolved to the same effect on the proposition of Professor Lyon-Caen, both as regards capacity for litigation and right to trade (*Annuaire*, 1892, 163), subject to their compliance with local laws and public order, failing which their directors or representatives may be made personally liable in full for all transactions there entered into.

A novelty in the present Convention is, that it takes the domicil of the foreign company as the test of its nationality—

a standard which has now the more general support, defined as the "place of the centre of its affairs or of its principal establishment" (Belgian, Italian and Roumanian law, Weiss 419). It is true that the French Courts and the Institute incline to the *siège social legal*, or *administratif*, as the test (Weiss, 415—418; *Annuaire*, 1892, above); but for bankruptcy the French law of 1889 gives jurisdiction to the place of domicile; and in several systems it is declared that this is not necessarily the same as the place of its constitution (Italy, Portugal, Roumania).

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### The Rights of Aliens.

It has been recently held in a metropolitan police court that a foreign child falls within the scope of the Prevention of Cruelty to Children Act 1894, s. 2 (a), and if under the age of eleven cannot play in public as an entertainer without a licence from a magistrate, when over seven years old (s. 2 (1)).

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It is announced that a Bill is to be introduced into Parliament next Session restricting the grant to masters and mates of British pilotage certificates to officers of British (including Colonial) ships. The proportion of alien officers so certificated is under one-fortieth of the whole number; and the Board of Trade are said to regard the matter, therefore, as unimportant.

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### The Site of a Debt.

In *In re Derwent Mills Co.* (21 Times L. R. 81) questions were raised which have already come before the Courts, namely, what is the locality of a debt, and whether a creditor, attaching property of a debtor in one country can claim preference in another country over other creditors of the debtor there in bankruptcy (*West Cumberland Iron and Steel Co.* (L. R. [1893], 1 Ch. 72), and *Maudslay's Case* (L. R.

[1900], 1 Ch. 602), discussed in these Notes, May 1900, Vol. XXV, 351). A debenture holder of an English company, being temporarily resident in Scotland, arrested there a debt due to the company from a third party (another company registered in London but having branches in England and Scotland), and on this brought a suit against the company in Scotland. Other creditors who held all the first debentures of the debtor company, and three-quarters of the second debentures issued by it, the rest of which were held by the arresting creditor, afterwards sued the company, and the debenture holders obtained the appointment of a receiver of all the company's property, and they applied to restrain the arresting creditor from withholding the debt from the receiver to their prejudice. The debt arrested was owed by the third party debtor to the debtor company for goods supplied by the latter from its works in Cumberland to the Glasgow branch of the third party. As the arrestment had taken place some time previously, and proceedings were pending in the Scotch Courts, the judge, Kekewich, J., postponed the case till the Scotch Courts had decided, meanwhile intimating his opinion that the debt was an English asset, being due from a company with a registered office in England, and that as the debenture holder was a party to the present action and the appointment of the receiver, he had jurisdiction to prevent the receiver's right being interfered with.

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### Shareholders' Liabilities.

A decision of the first importance to shareholders of British companies carrying on business abroad has been given by Kennedy, J., in *Risdon I. & L. Works v. Furness* (*Times*, January 12th)—an action against a shareholder in a British registered company carrying on business in California. By the law of California, stockholders of a corporation are individually and personally liable for all debts



and liabilities incurred during membership in proportion to their holding; foreign corporations are not allowed to do business in the State on more favourable terms than native ones, and the liability of their members is the same. The objects of the company were declared in the Memorandum of Association to be the acquisition and working of mines and minerals and concessions, etc., abroad. The plaintiff sued the company in California, but this was superseded by the company's bankruptcy, and he now sued a shareholder for the amount of his claim against the company, and for the costs of the former action proportionate to his holding in the company, on the ground that he had authorised his directors to pledge his personal credit under Californian law. The claim was rejected, on the ground that the constitution of the company was governed by English law, and to impose unlimited liability on the shareholders would be *ultra vires* of the directors. This seems in accordance with the English decision, that the liabilities of members of foreign corporations here are the same as in the country of their incorporation; and here, though we recognise the *lex loci actus* as also governing the capacity of a corporation, and Californian courts are at liberty to apply their own law, the constitution of an English company is decided by our law.

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### Divorce Law.

It is announced that the French Senate have passed a Bill removing the prohibition against the marriage of a divorced person with the co-respondent. It is interesting to compare with this the new canon adopted in the Protestant Episcopal Church of America, under which no marriage can take place for a year after divorce; the cause of divorce is examined; a bishop's licence is necessary, which is a matter of discretion and after consultation with his legal advisers, and a clergyman can refuse to perform such a marriage.

G. G. PHILLIMORE.

## VII.—NOTES ON RECENT CASES (ENGLISH).

THE December part of the *Law Reports Appeal Cases* is taken up chiefly by an elaborate report of the Free Church Case (*General Assembly of Free Church of Scotland v. Lord Overtoun and others* [1904], A. C. 515). It is not intended here to criticise or comment on the decision, which, so far as the judgments of the majority of the House of Lords are concerned, is simply an application of the ordinary doctrines of the Law of Trusts to the trusts for the Free Church of Scotland by ordinary lawyers. The judgments of the minority, however (Lords Macnaghten and Lindley), are, we venture to think, of much greater interest. They seem to us to be the application of the ordinary doctrines of the Law of Trusts to the trusts for the Free Church of Scotland by statesmen. The Legislature, and for that matter the Courts too, in a lesser degree, have long recognised that charitable trusts are in a different position from private trusts. The Courts have upheld charitable trusts which have broken the rule against perpetuities, and which have failed to define specifically the *cestui que trust*. The Legislature has given to the Charity Commission and the Courts enormous powers as to the remodelling of the purposes of charitable trusts. It is in the spirit of these proceedings that the dissentient Lords of Appeal, and especially Lord Macnaghten, have claimed for the body of the Church for which property is held in trust, the right to modify in all but essentials the character of the Church without forfeiting the trust property. The decision of the majority of the Lords hidebinds the belief of a Christian Church as strictly as if the Divine covenant between God and man had been made by an indenture.

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It is but rarely that one sees reported in the same volume examples of what may be called the positive and the

negative application of a rule of law or of construction. This has occurred in L. R. [1904], 2 Ch. The rule is that respecting limitations of equitable estates of freehold without words of limitation. That rule is frequently stated both by judges and text writers, rather loosely; as for example, that in executory trusts the Court will follow the intention, but in executed trusts the limitations must be stated as technically as if the settlor was dealing with the legal estate. The real rule seems to be that while in executed trusts technical words are not absolutely necessary, the intention to confer more than a life estate must be perfectly clear if technical words of limitation are not used. Thus, in *In re Tringham's Trusts*, *Tringham v. Greenhill* (L. R. [1904], 2 Ch. 487), copyholds were surrendered to trustees and their heirs upon trust for A. for life, and after A.'s death for her husband, and after the death of the survivor for the children of the marriage equally as tenants in common, and in default of issue to such uses as A. should appoint with remainder to the right heirs of A. Held, that the intention that the children of A. should take the fee simple in common on the death of their father and mother was sufficiently expressed. In *In re Irwin*, *Irwin v. Parkes* (L. R. [1904], 2 Ch. 752), on the other hand, the settlor was equitable owner of some freehold houses—they were subject to a legal mortgage—which he transferred to trustees (without words of limitation) to hold for his wife for life, and then for himself for life, and then for their children without words of limitation. The trust deed described him as “absolutely” entitled to the houses and declared that the term “trustees” included the actual trustees appointed and “their executor and administrators.” Held, nevertheless, that the trustees took an interest for their own lives merely, and of course, the *cestuis que trust* could take no more. The decision was distinguished from that in *In re Tringham's Trusts* (*supra*) on the ground that, in that case, the trustees clearly took

the legal fee simple, and it was that which they were directed to hold in trust for the *cestuis que trust*. The distinction is somewhat thin. The greatest objection to allowing limitations without the use of technical terms is, that when technical terms are not used, nobody but a lawyer can give even an opinion as to what estate has been created.

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Another equitable rule which is usually or rather invariably vaguely stated, is that with regard to interest on future legacies to infants. It is commonly said that where a father leaves a legacy to a child contingently on its attaining twenty-one, such legacy during the child's infancy carries interest. This should be "carries such interest as is necessary for the child's maintenance." That certainly was the rule followed by the Court of Chancery before the Conveyancing Act 1881, though, as Vaughan Williams, L.J., truly points out, no such limitation is stated by Lord Hardwick and the other judges who established this rule. (See *In re Bowlby*, *Bowlby v. Bowlby*, L. R. [1904], 2 Ch. 685.) In construing sect. 43 of the Conveyancing Act 1881, Buckley, J., in *In re Scott* (L. R. [1902], 1 Ch. 918), disregarded the old practice of the Court, and held that accumulations of income during the minority of a child became, on the child's attaining twenty-one, such child's absolute property, even though the child took only a life interest in the settled estate. The decision has now been overruled by the Court of Appeal in *In re Bowlby* (*supra*), and henceforth such accumulations are to be treated as *corpus*. Probably the practical result of this decision will be that henceforth there will be very small accumulations, since trustees can now without the sanction of the Court, and without risk to themselves, hand over all the income of the settled property to the infant's parent, and trustees are liable in such circumstances to pressure.

In *In re Blunt's Trusts, Wigan v. Clinch* (L. R. [1904], 2 Ch. 767), Buckley, J., has followed, apparently without misgiving, the curious decision of North, J., in *In re Randell* (38 Ch D. 213). In the latter case, trustees were directed to pay over the income of the trust property for the benefit of a certain church so long as it contained nothing but free seats, but when it ceased to fulfil this condition the trust property was to fall into the residue of the testatrix's personal estate. This residue was given to certain relatives of the testatrix in certain proportions. The question arose whether the gift over did not transgress the rule against perpetuities. North, J., held that it did not, since the gift for the church was only of the income till the happening of a certain event, and on this happening the *corpus* was to fall into the residuary estate, which is where it would go if there was no gift over. Buckley, J., has now extended this doctrine to the case where the gift is plainly of the *corpus* itself. If this decision is held good, it would seem that the old doctrine of Common law conditions affecting legal estates, which has been declared to be contrary to the rule against perpetuities, is being reintroduced as regards equitable estates. Thus, if land were limited in fee simple to a charity or a private person until the happening of an event which might not happen within a life or lives in being and twenty-one years, and on the happening of such event, it was to revert to the grantor's heirs, this at Common law was a good condition before the rule against perpetuities was heard of and also long since the statute *Quia Emptores*. But in *In re Trustees of Hollis' Hospital and Hayne's Contract* (L. R. [1899], 2 Ch. 540), it was held to be bad now as contrary to that rule. Apparently, however, personal property may now by means of a trust be settled in the same way, and there is no reason why realty should not either.

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*Manners v. St. David's Gold and Copper Mines, Limited* (L. R. [1904], 2 Ch. 593), like *Moseley v. Koffyfontein Mines*,

*Limited* (L. R. [1904], 2 Ch. 108) (commented on in our November 1904 issue at p. 92), shows the determination of the Courts that all proceedings in connection with companies shall be *bonâ fide*. Here the company had powers under its memorandum of association to sell the undertaking for shares in another company, and if the old shareholders refused to accept the shares in the new company within a time limit, their shares were to be forfeited. The company in purported pursuance of these powers sold to another company for shares only partly paid up. Held, that the agreement was not a sale within the meaning of the memorandum, but was really a reconstruction of the company with the object of raising further capital.

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A very curious limitation is that which was revealed in *In re Crawford's Settlement, Cooke v. Gibson* (L. R. [1905], 1 Ch. 11). There, in a marriage settlement, the wife was to become absolutely entitled should she "survive her now intended coverture." The wife was divorced, and it was held that she became absolutely entitled. Is such a condition as this not contrary to public policy, as an encouragement to a wife to commit such acts as are likely to lead to a divorce?

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The reluctance of most text writers to express any opinion on a point that has not been expressly decided was shown strongly in *In re Hancock, Hancock v. Pawson* (L. R. [1905], 1 Ch. 16). There the question was this: When a case of election arises under a will, and the legatee elects against the will, at what time do the rights of the parties become fixed? It was held that they became fixed not at the time of the actual election but at the time when the duty to elect arose—that is, the death of the testator. Accordingly, the compensation to be made by the legatee to the person disappointed by the election depends on the value at that

time of the legatee's property intended to be given to the disappointed person. Strange to say, none of the numerous treatises on equity seems to refer to this point except *Ashburner on Equity*. (See *ibid.*, p. 673.)

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The burden of an ordinary trustee is heavy, but that of a trustee who is also a beneficiary is heavier still. It has always been held that if he is party with other trustees to a breach of trust, he is not entitled to contribution from them till all his interest in the trust property is exhausted. And now it has been decided that if by accident he pays to other beneficiaries trust money which really belongs to him he cannot recover it again. (*In re Horne, Wilson v. Cox-Sinclair* (L. R. [1905], 1 Ch. 76.)

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*Edwards v. Hood-Barrs* (L. R. [1905], 1 Ch. 20) is a peculiar decision. There, one of two trustees compromised as to his liability for a breach of trust which he and the other had committed. The other's estate was insolvent. It was held that, although part of the trust funds lost through the breach had, under the compromise, been repaid, still the beneficiaries could prove for the whole loss as against the insolvent estate. This may be good law, but it looks very like proving for a debt which does not in fact exist.

J. A. S.

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The Bankruptcy Act 1883, s. 4, sub-s. 1 (h), says that a debtor commits an act of bankruptcy if he "gives notice to any of his creditors . . . that he is about to suspend payment of his debts." No doubt this part of the sub-section is too widely expressed, and it has been interpreted in one or two cases. But now the Court of Appeal, in *In re Reis ex parte Clough* (L. R. [1904], 2 K. B. 769; 91 L. T. R. 592), has held, reversing the decision of Wright, J., that it is not such an act for a debtor to give notice to all

his larger creditors of his inability to meet their claims. And, as a consequence, the Court also held that a covenant in a marriage settlement to transfer all after-acquired property, except business assets, to trustees for the settlor's wife, was valid, notwithstanding that the transfer had been effected only a day or two before an indubitable act of bankruptcy, and some time later than the date of the notice the subject of the decision; and notwithstanding, also, that in an earlier bankruptcy of the settlor the wife's trustees had not proved against the estate. The decision over-rules *Ex parte Bolland*, *In re Clint* (L. R. [1873], 17 Eq. 115), and follows the earlier cases of *Hardey v. Green* (12 Beav. 182) and *Lewis v. Maddocks* (18 Ves. 150; 17 Ves. 48). But it is curious that both these cases were considered by Sir James Bacon, in his judgment in *Ex parte Bolland*; and he there said "There are many cases in which the policy of the law has been declared to be that a man cannot withdraw from his creditors, even in consideration of marriage, future property which he may acquire, if at the time other persons, viz., his creditors, have the right to be paid out of the property." To a man bent on "a purpose of marriage," who still has daring left for other hazardous enterprises, such for instance as Stock Exchange speculations, an antenuptial settlement is a protecting shield. It may, if his financial forays should bring him to pause on the steps of the Bankruptcy Court, defend him from the rude assaults of the trustee in bankruptcy. But he must exercise forethought. For instance (to take a purely imaginary case), if he should, like Hamlet, be "indifferent honest," and should have devised a settling covenant not wholly out of affection for his intended wife, but partly "of malice, fraud, collusion or guile," "to hinder, delay, or defraud creditors," in the blunt language of 13 Eliz., c. 5, he must take care that there is no evidence that the lady was privy to the connubial design. Again, to avoid disparaging suggestions, under



sect. 47 of the Bankruptcy Act, it would be well for him not to defer too long the transfer of the property.

*Hippisley v. Knee Brothers* (L. R. [1905], 1 K. B. 1; 74 L. J. R., K. B. 68); *Powell and Thomas v. Evan Jones and Co.* (L. R. [1905], 1 K. B. 11). With respect to these two cases it may be said that it is, at the least, surprising that any business man can be ignorant that the receipt of secret profit by an agent is contrary to the law. The Lord Chief Justice, in the former case, ascribes the giving or taking of such concealed gleanings to "an extraordinary laxity of mind." In certain businesses there seems to be a custom to allow to auctioneers a discount on accounts paid by them which is not given to other persons. The exceptional nature of the allowance might, one would think, suggest to the person who concedes the abatement, that the account, without the deduction, is what would be charged to the auctioneer's principal. And the person who accepts the discount should bear in mind that, not only may he be required to surrender what he has retained, but that he may lose his right to payment which he would otherwise have been entitled to for services rendered in the transaction. Where he is to be paid, as Kennedy, J., pointed out, for the performance of several inseparable duties, his whole remuneration may be forfeited; though, if the duties are separable, the remuneration which can be allocated to those not tainted by the secret profit may be claimed. A more serious form of hidden payment is when one principal gives a commission to the agent of the other. All persons who contemplate such dealings should remember that they make themselves liable not only to civil, but to criminal, consequences. It is not very long ago that a very impressive case occurred. Attempts to suppress the evil by special legislation have been made four times within the last six years.

In *Hall v. Potter* (6 Wm. III; 3 Lev. 411 and Shower's P. C. 98), it was said that "Bonds to Match-makers and Procurers of Marriage are of Dangerous Consequences and tend to the Betraying and oftimes to the Ruin of Persons of Quality and Fortune." That was a marriage-brocage case. It was a past generation that the marriage broker blest with his favours. The Courts stamped him out long ago, by decreeing that his contracts to bring about for reward marriage between definite persons, were void as against public policy. But in our day his place has been taken by the matrimonial agent, who generally owns a matrimonial paper and offers the improbability of domestic happiness to those who are friendless and forlorn, but yet have money to expend in employing his services. Like a good citizen he keeps within the law, for he limits his undertaking to securing interviews between parties. Brocage was outside the law, because it was for procuring marriage between parties specified. In *Hermann v. Charlesworth* (L. R. [1905], 1 K. B. 18; 74 L. J. R., K. B. 25), a claim to set aside a contract of the modern kind on the ground of illegality failed.

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By our law a forged endorsement on a bill of exchange is by sect. 24 of the Bills of Exchange Act of course inoperative. But Austrian law is different, for it seems that under it a *bonâ fide* holder for value of a cheque is entitled to the proceeds, even though the document had been previously stolen and an endorsement on it forged. As sect. 72 (2) of the Bills of Exchange Act, dealing with the Conflict of Laws, says that the interpretation of an endorsement is to be determined by the law of the place where the contract was made, the decision in *Embericos v. Anglo-Austrian Bank* (L. R. [1904], 2 K. B. 870), on a claim for wrongful conversion, could hardly have been otherwise than in favour of the defendant, for in that case a cheque on a London bank

was drawn abroad by a foreign firm in favour of the plaintiff, in business abroad, who endorsed it to his correspondent in London for collection. It was stolen on the way, the endorsement of the London correspondent forged, and the cheque cashed in good faith by the defendant bank in Vienna, who in due course obtained the money from the bank on which the cheque was drawn. But the decision was practically given on the strength of *Alcock v. Smith* (L. R. [1892], 1 Ch. 238), in which the judgment of Romer, J., was upheld by the Court of Appeal.

T. J. B.

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### SCOTCH CASES. .

The Outer House judgment, *Tait v. Hopes Factor* (42 Sc. L., Rep. 17), does not introduce any startling or complex law, but it serves to illustrate an important difference between the law of Scotland and that of England in the limitation or prescription of the accounts of tradesmen, retail merchants, professional men, etc. This difference attracted considerable attention on the part of the Royal Commission appointed in 1853 to report as to the assimilation of the mercantile laws of the United Kingdom. The commissioners recommended that the scope of the English limitation should be widened by the removal of an exception bearing on accounts between merchant and merchant, and that, this being done, the law of Scotland should be assimilated to that of England. The result of the labours of the Commission referred to was the passing in 1856 of Mercantile Law Amendment Acts referring to England and Scotland respectively. The English Act carried out the above-mentioned recommendation as to the amendment of the law of England, but the Scottish Act made no reference to the subject, and therefore the divergence remains as before. In England, accounts are subject to a limitation of

six years: in Scotland the period is three years, but this does not exhaust the difference. In England no item of the account which bears a date beyond six years can be recovered: in Scotland the period of limitation (or prescription as it is called) runs from the date of the last item of the account, and does not affect previous items provided there is no interval of more than three years between any of them. Naturally, the Scottish rule is subject to attempts at evasion by appending fictitious entries to the account in order to bridge over the gap between the date of the last *bonâ fide* item and the date of the action for payment. The case under notice was an attempt of this description by adding to the business account of a solicitor certain charges for letters demanding payment of the account itself, but the Lord Ordinary (Pearson) refused to take these into account, and the plea of prescription was therefore sustained.

Among recent judgments of the House of Lords on appeal from Scotland that of *Rossi v. Corporation of Edinburgh* (42 Sc. L. Rep. 79) affects the interpretation of powers vested in magistrates by a private Act. A strong impression has lately been gaining ground among the more thoughtful students of municipal and general politics, that the ease with which the larger centres of population in Scotland obtain police and other powers differing from the general law of the land is prejudicial to national interests. In Edinburgh and Glasgow particularly, the rule now seems to be that a municipal corporation can obtain by private Act almost any powers over the individual which it chooses to ask, provided there is no associated body of citizens strong enough and wealthy enough to make an opposing representation to Parliament or to the Provisional Order Committee. A glaring instance is the power which Glasgow obtained during last Session of Parliament to levy a special tax upon particular private traders for the upkeep of a municipal

market which the traders in question do not use and have no occasion to use. It is a practical return to the mediæval notion of a close corporation for trading purposes. A slight extension of the principle will result in the re-establishment of the curfew bell, informing all well-disposed citizens that the hour has arrived when they must retire to rest. The case under notice affected the ice-cream dealers of Edinburgh, who, by a private Act of 1900 and an Order of 1901, are not allowed to sell ice-cream without a licence from the magistrates. Almost every one of the judges before whom the case was argued, from the Lord Ordinary in the Court of Session to the Lord Chancellor in the House of Lords, expressed his inability to comprehend how any question of public order could arise in connection with the sale of ice-cream. Criticism of the policy of an Act is, however, beyond the province of a Court of law, and such remarks are of course incidental. The question at issue was, whether the power to grant a licence involved also the power to insert the following conditions: (1) that the premises should not be kept open on Sundays or on other days appointed for public worship by lawful authority; (2) that the premises should not be kept open for the sale of ice-cream therein before 8 a.m. or after 11 p.m.; and (3) that the magistrates or any of them might at any time revoke or suspend the licence. The Lord Ordinary (Kincairney) held that the conditions were justified by the general power; the Inner House (Second Division) affirmed, on the ground that the magistrates were entitled to lay down such reasonable conditions in their licence as would carry out both the spirit and the letter of the statutory enactment; while the House of Lords unanimously reversed both judgments, holding the form of licence to be *ultra vires* of the magistrates. The Lord Chancellor said:—"It is a restraint of a common right " which all His Majesty's subjects have—the right to open " their shops and to sell what they please, subject to legisla-

“tive restriction, and if there is no legislative restriction  
 “which is appropriate to the particular thing in dispute,  
 “it seems to me it would be a very serious inroad upon the  
 “liberty of the subject if it could be supposed that a mere  
 “simple restriction which the Legislature has imposed  
 “could be enlarged and applied to things and circum-  
 “stances other than that which the Legislature has con-  
 “templated.”

Since the passing of the Sale of Goods Act 1893 only two Scottish cases deal with the important subject of stoppage *in transitu*. The first was *Cowdenbeath Coal Company Limited v. Clydesdale Bank Limited* ([1895], 22 Ret. 862), and the second, decided on 8th November last, was *M'Dowall & Neilson's Trustees v. J. B. Snowball Limited* (42 Sc. L., Rep. 56). Both cases were brought before the same Lord Ordinary (Low), but the former case was heard on appeal, and a contrary opinion given on this point by the First Division, while the latter was reviewed and affirmed by the Second Division. The peculiarity of the *Cowdenbeath Company's Case* is, that so far as the report bears, the Sale of Goods Act, which deals explicitly with the question at issue, was not once referred to either in argument or in judgment. There is a long review of the authorities upon which the provisions of the Act are founded (sect. 45), but it would have saved a world of discussion and citation if the statutory interpretation of these authorities had been made the basis of judgment instead of the authorities themselves. In the end the rule of the Act was vindicated, and as it happened that this was the only point upon which the Inner House differed from the Lord Ordinary, his judgment on the main issue was affirmed. Both the cases deal with the duration of transit. In the *Cowdenbeath Company's Case* a contract for delivery f.o.b. at Burntisland was held to have terminated the transit immediately on

shipment at that port, so that the goods (coals) being on board, they could not thereafter be stopped by the sellers, though it was part of the contract between the parties that they should be exported by the buyers to some port abroad and not used in this country. In *M'Dowall & Neilson's Trustees v. J. B. Snowball Limited*, the contract was for shipment at Miramichi (New Brunswick), but the price included c.i.f. to Glasgow. The provision as to shipment at Miramichi was held to mean a shipment while that port was open, and not a delivery to the buyers who had no agent there. The "appointed destination" was Glasgow, and the goods (timber) were therefore lawfully stopped by the sellers on their arrival there.

The Spanish Government, through the *Castaneda Case*, has made an appreciable contribution to the exposition of Scottish law. We first met the case in a question of title to sue, and in this Magazine we ventured to differ from the view of the Court of Session (Vol. XXVII, p. 358). It was with some satisfaction that we afterwards hailed a judgment of reversal by the House of Lords (Vol. XXVIII, p. 102). The Spanish Minister of Marine, whose predecessor in office had entered into a contract for the building and delivery of four torpedo boats for use in the war then imminent with the United States, sued a shipbuilding firm in Glasgow in his own name for damages in consequence of late delivery. It was held by the Court of Session that the only competent instance was that of the Spanish Sovereign, and that the defect was not cured by a formal ratification by the King of Spain while the action was in progress. The House of Lords, on the contrary, was of opinion that the case did not involve any peculiarity of the law of Scotland, and that although the King of Spain might have the ultimate interest, the Minister of Marine was the contracting party and was consequently entitled to sue.

The main point at issue, on being again brought before the Court of Session, raised the important and difficult question as to the distinction between "penalty" and "liquidate damages." The contract provided for a penalty for late delivery "at the rate of £500 per week for each "vessel." All the vessels were late to the extent of forty-six, forty-one, twenty-eight, and twenty weeks respectively, so that the total sum claimed amounted to over £67,000. The Second Division held the claim to be one of "liquidate damages," which involved payment in full, and not merely "penalty," which would have meant a sum commensurate with the actual damage proved (*Castaneda v. Clydebank Engineering and Shipbuilding Company Limited* [1903], 5 F. 1016). The House of Lords has now affirmed this judgment ([17th November, 1904], 42 Sc. L. Rep. 74). A further point was as to an alleged waiver by the buyers' acceptance of the vessels as delivered, and by their making payment of the price at the time without express reservation of their claim to damages. This also was decided against the shipbuilders. On the question of penalty or damages, Lord Davey, after a review of the authorities, said: "I therefore conceive that "it may be taken as an established principle in the law of "Scotland that if you find a sum of money made payable "for the breach, not of an agreement generally, which "might result in either a trifling or a serious breach, but a "breach of one particular stipulation in an agreement, and "when you find that the sum payable is proportioned to "the amount or the rate of the non-performance of the "agreement . . . you infer that *primâ facie* the parties "intended the amount to be liquidate damages and not "penalty. I say *primâ facie*, because it is always open to "the parties to show that the amount named in the clause "is so exorbitant and extravagant that it could not possibly "have been regarded as damages for any possible breach



“which was in the contemplation of the parties.” The House was of opinion that, considering the circumstances of the impending war, there was nothing extravagant in the stipulation. On the question of waiver the Lord Chancellor said: “I am not certain that I understand the application of the doctrine of waiver to such a question as we are now dealing with of the release of a right of action already vested, but assuming we get over that difficulty . . . it would to my mind have been a very extraordinary thing if the Spanish Government should have risked the delay which would have arisen from a controversy in respect of claims . . . which would have come up to this House long after the war between the American and the Spanish Government had come to an end.”

R. B.

### IRISH CASES.

“Does our law allow one person to obtain a declaration that another person is illegitimate, or that that person is not the lawful child of the plaintiff, no claim to property or to any right enforceable by the Court being involved or advanced?” This is the important question which the Court (Porter, M.R.) considered to lie at the basis of *Yool v. Ewing* ([1904], 1 Ir. R. 434); and the case answers this question in the negative. A. sues B., his former wife, from whom he has obtained a divorce, and C., her infant child, whom B. alleged to be the child of A., claiming a declaration that C. is not the plaintiff's child, and an injunction restraining B. from continuing to make this allegation. This, it may be noted, is the converse of the procedure authorised by the Legitimacy Declaration Act 1858, which enables a suitor to apply to the Court for the purpose of having his own legitimacy judicially established; and that statute does not authorise proceedings to negative legitimacy. *Gardner*

*v. Gardner* (L. R. [1897], 2 A. C. 723) does furnish a precedent for an action brought against a person to deprive her of her status of legitimacy, and brought by the person whom she alleged to be her father. But that is a Scotch case and dependent purely on Scotch law. Jurisdiction to entertain the present action must therefore be sought under R. S. C., Ord. XXV, r. 5), which provides that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed, or not." The Court, however, thought that this rule was not meant to introduce a new jurisdiction, so much as an amendment of procedure. It assumes "that an actual right to something, which is or will be under the protection of the law, be it property or status, exists; and does not contemplate that, save as ancillary to such rights, the Court ought to be called on to make declarations. You cannot have a judgment and declaration in reference to rights which do not affect the plaintiff's status or property." Of course, if a claim is raised in which legitimacy is a material element in determining rights, the Court would have ample power to decide it. But there being no question of *the plaintiff's* right or status involved in the present case, and no question as to rights of property or other rights to which the infant defendant's legitimacy was material, it was held that the action was not maintainable.

It is not quite easy to state the decision in *In re Hallinan's Trusts* ([1904], 1 Ir. R. 452), so<sup>a</sup> as to make it square with the ordinary law upon the application of the rule against perpetuities to appointments under special powers. Ordinarily, of course, an appointment under a special power will

be void for remoteness, unless it would have been good as an original limitation in the instrument creating the power. In the present case, a testator was entitled under his marriage settlement to a life-interest in lands, with power to appoint among his children. By his will he appointed these lands to one daughter on her attaining twenty-five. The daughter was in fact fifteen years old at his death. It was held by the Master of the Rolls and affirmed by the Court of Appeal that the appointment was not void for remoteness. The estate created by this appointment would of course vest *in fact* within twenty-one years after the determination of a life in being at the date of the original settlement. The ground of the decision is apparently (though the Court does not put it in this way) that this appointment must be read as if the limitation in the settlement had been "to A. for life, and ten years after his death to his daughter B." The authorities relied on were chiefly two—neither very convincing. In *Wilkinson v. Duncan* (30 Beav. 111), the appointment was to daughters on attaining twenty-four; they did attain that age within the period fixed by the rule, and the appointment was held good. Lord Romilly, M.R., said: "With respect to the daughters, as the number of sums of £2,000 were ascertained at the death of the nephew, I think that those who attain their age of twenty-four within the period of twenty-one years from the death of the nephew are entitled to their shares." In *Von Bronckdorf v. Malcolm* (L. R., 30 Ch. D. 172), Pearson, J., held incidentally that an appointment under a special power to those of the donee's daughters who should survive him and attain twenty-four was not void, inasmuch as the youngest child was three years old at the donee's death. The rule, therefore, appears to be that if the power is exercised in favour of a person named or described, whose interest is directed to vest at a period exceeding twenty-one years after a life in being, but must in the nature of things actually vest before the

expiration of that period, the appointment is good. The common short statement of the rule, to the effect that the limitation created by the appointment must be read into the settlement, and its validity then judged by possible and not actual events, is misleading. The appointment must be read as if the settlement contained a limitation to *the particular appointee*, vesting at the time fixed by the appointment.

Two cases are noticeable as decisions on that puzzling statute, the Finance Act 1894. The points in both are apparently uncovered by previous authority. *In re Lombard* ([1904], 2 Ir. R. 621) turns upon the construction of sect. 3 (2) of the Act. That section in substance enacts that estate duty shall not be payable in respect of property passing on death by reason only of a *bonâ fide* purchase from the person under whose disposition the property passes, if full consideration in money, or money's worth, was given for such purchase, and continues: "Where any such purchase was made for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty." Does this apply to property put into settlement by a husband on his marriage, partly in consideration of the marriage and partly of the transfer by the wife to him of certain other property? A. by his marriage settlement limits lands to himself for life and afterwards to his wife B. absolutely: as part of the marriage contract, B. transfers certain shares to A.; the consideration for A.'s grant of the lands is expressed to be the marriage and the transfer of the shares. On A.'s death, is B. entitled to deduct the value of the shares, and pay estate duty only on the surplus value of the lands? The King's Bench Division answer in the affirmative. Palles, C.B., in delivering the judgment

of the Court, referred to *Attorney-General v. Rathdonnell* (32 L. R., Ir. 574), a case under sect. 17 of the Succession Duty Act 1853, wherein it had been held that contracts in which the consideration was in part money and in other part marriage were excluded from that section. The result of that decision was, that not even the portion of the settled property equal to the pecuniary consideration was exempted from duty. He thought that the Legislature, in framing the Act of 1894, must have had its attention directed to that decision, and that it so modified the words of that part of the new enactment, which was *in pari materia* with that section, as to permit the consideration to be divided, and to treat the interests taken under a marriage settlement as gratuities only to the extent to which they had not been purchased by money or money's worth.

The other case is *Attorney-General v. Jameson* ([1904], 2 Ir. R. 644). It is also a new point, and of great importance; but as it will certainly come before the Court of Appeal, and probably before the House of Lords, only the briefest notice is necessary here. A company, practically private, has for many years paid 20 per cent. on its shares. Its Articles provide that any member proposing to transfer a share shall serve a transfer-notice on the Company, thereby constituting the Company his agent for the transfer of his shares to any member at the "fair value": no shares shall be transferred to a non-member if the Company can within twenty-eight days find a member willing to purchase them at this "fair value," which is fixed at £100. On the death of a member, are his executors liable to pay duty on the "fair value" of his shares, or on some other and greater value? It was held by Boyd and Kenny, JJ., that in estimating the value of the shares for duty, regard was to be had to the provisions in the Articles as to alienation and transfer, and as to the fair value: and by Palles, C.B. (dissenting), that the valuation

of the shares ought to be based on a supposititious sale in the open market, leaving out of consideration those provisions in the Articles which would prevent a purchaser from becoming a member of the Company. The question is as to the meaning of sect. 7 (5) of the Act, which directs the value of property to be estimated at the price which it would fetch "if sold in the open market at the time of the death." On the one hand there is considerable force in the argument that, in any actual "open market" for these shares, no purchaser would be likely to give more than £100 per share. But on the other hand, that which passed on the death of a member to his representatives was, in their hands and to them, worth much more than £100 per share; and it is submitted that the better opinion is the Chief Baron's, and that the "open market" of the section is only an artificial mode of estimating the real value of the property which passes.

J. S. B.

## VIII.—CORRESPONDENCE.

### THE RIGHT TO RETAIN AN ADVOCATE.

*To the Editor of the Law Magazine and Review.*

SIR,—At the outset, I desire to acknowledge most gratefully your courtesy in granting me the use of these pages to give expression to my views on an important public question. I appreciate all the more your kindness, having regard to the fact that the writer is not a member of the legal profession.

I have read the exceedingly interesting article on this subject in your August number,<sup>1</sup> and heartily recognise the fair and impartial way Mr. Cox-Sinclair approached and treated the subject throughout. I have very little or nothing to join issue with him as regards the contents of the article, but I am much indebted for the immense trouble he has taken to ascertain facts at home and abroad, which support in the main my contentions throughout this controversy, as

<sup>1</sup> *L. M. & R.*, Vol. XXIX, No. 333.

it appertains to Wales and the conduct of her Liberal barrister Members of Parliament accepting briefs from licensed victuallers. The headline, "*The Right to retain an Advocate*," appears to imply that there are those who deny the postulate. I shall come to this point at a later stage. The headline adopted by the Welsh people is: "Welsh Liberal M.P's and '*Trade*' briefs," which is clear and simple enough, and conveys its own significant meaning, although it is more or less paradoxical. The association and relationship of Welsh Liberal barrister members with the drink traffic in Wales is a long-standing grievance, and a very sore point among Welsh Non-conformists, Liberals, and temperance people. For the last eighteen months or so, it has been most acute and much discussed in every part of Wales and among Welshmen generally, and it has come to be considered a matter of supreme importance in view of the next general election.

At present there are six, at least, Welsh Liberal seats involved by this controversy, through their representatives being in the habit of advocating the interests of the licensed victuallers and those who would be licensed victuallers, at brewster sessions and licensing meetings. Naturally, the movement to terminate this most inconsistent feature in political and public life has been misinterpreted and misrepresented. This was to be expected, as it is the usual fate of all movements for reform. At first, it was opposed as being impracticable and ridiculous, and only quite recently a well-known Welsh journalist had the hardihood to write: "Of all the foolish attempts in Wales, the most idiotic is the attempt to deny licensed victuallers legal assistance in their cases when they require it. There are some people who think that a publican ought not to be able to engage a Welsh barrister to appear for him in a case," and further—"on principle it was the same as the action of those Puritan fanatics in the past, who would make attendance at a place of worship compulsory, etc." Needless to say, utterances like the foregoing are altogether beside the issue. Secondly, it came gradually to be considered that there was something worthy of attention in the movement: and latterly there is a consensus of opinion, and it is generally agreed, that it is a movement that should be supported, not only by temperance people, but also by intelligent and consistent Liberals. Many are the resolutions condemnatory of the practice and demanding its abandonment, that have been adopted by public conferences and meetings

representative of the religious and temperance sentiment of the mass of the people. During the period of one year, 1903, the following religious denominations at their Annual Assemblies have made important pronouncements, which cannot safely be disregarded. 1. The Welsh Calvinistic Methodists or Presbyterian Assembly; 2. The Welsh Congregational Union of Wales; 3. The Welsh Wesleyan Assembly; 4. The Baptist Union of Wales; 5. The North Wales Temperance Association, for the third or fourth time; 6. The South Wales Temperance Association; 7. Federated Free Church Councils of North Wales, without mentioning other local organisations. I shall reproduce here the important and significant resolution carried at the Annual Conference of the North Wales Temperance Association at Abergele, on September 30, 1903, when delegates were present from all parts of North Wales and from England. And the following week the South Wales Association adopted the motion almost identically:

“ That this Annual Conference of the North Wales Temperance Association  
 “ at Abergele re-affirms its emphatic condemnation of the practice of a certain  
 “ number of Welsh Members of Parliament in representing the interests of the  
 “ Liquor traffic at the Brewster Sessions and Licensing Meetings in Wales; also  
 “ it urges upon the various Temperance and Political Associations when any  
 “ barrister is a candidate to secure from him a pledge, that in the event of his  
 “ return to Parliament, he will not accept briefs from the ‘Trade’ in this respect.  
 “ That the Secretary forward this Resolution to the notice of the County Tempe-  
 “ rance Associations and the Liberal Associations in the divisions of North Wales  
 “ which are represented by barristers.”

The reader will observe that this resolution is definite and emphatic. All that is being asked of the Parliamentary candidate who is a barrister is—“that he will not, in the event of his return, accept briefs from the licensed victuallers while holding that representative and influential position, to ask for—(1) new licenses; (2) renewal of expiring ones; (3) defend licensees on charges for the infringement of the licensing laws; (4) not to appear at Quarter Sessions to attempt to quash the decisions of local justices in these matters which has been such a scandal in the past.” The issue is transparent enough to all who desire to comprehend it. What is objected to is, that Welsh Liberal Members of Parliament should give their aid to strengthen, to extend, and to uphold the great drink monopoly, and to resist the efforts of their temperance friends to limit and to reduce, if possible, a great national evil; especially, as they are returned to Parliament as members of a



Party pledged to promote temperance reform in and out of the House of Commons. When the electors see one of these gentlemen so engaged for the liquor traffic, they see first and foremost the Welsh Liberal Member of Parliament, and to them at any rate, it appears anomalous and a breach of trust ; while to the "Trade" it is apparently a diplomatic move and an earnest of success and a triumphant issue ; or, as Mr. Arthur Chamberlain most forcibly puts it in a letter to the writer last year, "The brewers only brief them " because of the special injury to the temperance cause their position " as representatives of temperance constituencies enables them to " do." Consequently, Mr. Cox-Sinclair will see that we have placed quite another complexion on the reason why the Welsh Liberal barrister M.P's are engaged in these "Trade" cases at the Brewster Sessions, &c. in preference to other Welsh barristers, of whom there are plenty of capable men. Therefore, the situation as far as Wales is concerned, is not as he depicts or implies in the following quotation from his article :

"The unwillingness of a particular advocate may become of " practical importance to the particular client. The law may be " complicated, the facts may be so involved as to need expert " statement, the stake at issue may be large, the field of expert " assistance may in a particular locality be small, and so the refusal " of a retainer may result in a substantial injustice, &c." Without reflecting at all upon the professional accomplishments of any of the Welsh barrister M.P's, they are really not engaged primarily for their expert legal knowledge of "Trade" and licensing matters, but on the contrary, the element of ornamentation and astuteness on the part of the Trade enters into the transaction.

Take the question of granting a licence to sell intoxicants ; it has always been regarded as a "*favor*" and "*privilege*" for one year and not as "*justice*."

What will your readers say to this : A Welsh Liberal M.P. at Quarter Sessions last year, when appealing for a particular licence which had been refused by the justices (the applicant being practically the nominee or manager of a brewing company at a long distance), told the magistrates at Quarter Sessions : "You have no " magisterial discretion in the matter : all you have to do is to " ascertain whether the applicant is a fit and proper person to hold " a licence." The Licensing Act of 1904 was not then in force ! Mr. Cox-Sinclair is not in a position to direct us to any statute

or any clear rule by the General Council of the Bar on the point. He states—"the only statute which directly relates to the rights and duties of an advocate is that of Edward I, 1275. The punishment provided by that statute appears, however, to be directed to the advocate who should, in the conduct of a case before the King's Court, be guilty of any manner of deceit and collusion, and does not appear to be directed to the selection of causes which the advocate may or may not appear." Mr. Cox-Sinclair admits that the most important declaration ever made subsequent to the statute referred to is that of the General Council of the Bar this year, which also admits "*that special circumstances would justify a barrister in refusing particular briefs.*" The writer pointed out to the Council that that was simply the contention in Wales--the Welsh Liberal barrister members were in special circumstances as representatives of Non-conformist and temperance electors, and thus occupied distinct influential positions; and that the Trade briefs for the specific objects already referred to were of a particular nature which made it incumbent for them to refuse such. Possibly the General Council of the Bar had this in view when making the quite satisfactory pronouncement, as far as we are concerned.

I think that I have now given to your readers the gist of what has caused the prolonged and, latterly, sharp controversy which has raged in the Principality over the question of the "Welsh Liberal M.P's and their 'Trade' briefs." The matter has arrested so much attention, and has been so widely discussed, not only in Wales, but in England also that the dispute, if not amicably settled in the meantime, is sure to prove an important factor at the next general election.

Suppose the General Council of the Bar were to come to the rescue of the Welsh barrister M.P's, and to pass a stringent rule as Mr. Cox-Sinclair seems to suggest or hint at, at the close of the article—to the effect—that they must not refuse these particular "Trade" briefs complained of, and for the specific objects already defined in these pages. I maintain that such a step would only be creating a disability and a disqualification for members of the Bar to aspire to seats in Parliament for Welsh constituencies. Mr. Lloyd-George, who is a practising solicitor, has confessed that he has already "begged and prayed of certain of his colleagues to give up this practice," and he adds, "The time will come soon

when they will be compelled to choose between it (the position complained of) and a Welsh seat in Parliament"! As I have stated, this is a peculiarly Welsh domestic matter, and I think I have made this much amply clear.

I have endeavoured in the course of this communication not to make any extreme or harsh assertions; I have not discussed the Temperance question in any heated manner. The readers are familiar with and conscious of the enormity of the drink traffic in the country, and its baneful results on the people, materially, socially, and morally. I have no personal antipathy to a single licensed victualler in the land, and I close with disclaiming any bitterness towards even one Welsh member of Parliament; and I am not wanting in respect and admiration for the honourable and learned profession of the Bar.

Your obedient Servant,

*Liverpool.*

HUGH EDWARDS.

#### NOTE BY MR. COX-SINCLAIR.

The above communication of Mr. Hugh Edwards relates to that portion of my article "The Right to Retain an Advocate," which deals with the position of certain members of the Bar of England—who, whilst they for the time being represent in Parliament certain constituencies in Wales, may be retained, or may be requested to appear, on behalf of persons engaged in the Liquor Traffic.

The substance of the contentions of Mr. Hugh Edwards may be summed up in the following propositions:—

(1) That there is a strong Temperance feeling in Wales.

(2) That the outcome of that strong Temperance feeling has been the return of certain representatives to Parliament selected mainly or largely because of their advocacy of the Temperance Movement in every form.

(3) That amongst those representatives are certain members of the Bar of England.

(4) That as a condition of his return to Parliament each of these representatives, being a member of the Bar of England,

was required to give an undertaking, express or implied, that he would not professionally appear on behalf of persons engaged or interested in the Liquor Trade in support of any application which might tend to the advantage of the Trade or of a member of the Trade. That apart from any undertaking, express or implied, the representative of a constituency having a majority of Temperance Reformers is under a general obligation to do nothing in the course of his professional practice which may tend to advance the interests of the Liquor Trade.

(5) That in violation of this undertaking certain Parliamentary representatives, being Barristers, have accepted retainers from and have appeared on behalf of the Trade or on behalf of a member of the Trade in connection with such applications.

(6) That by such retainers and appearances the Trade or its members have gained an advantage by their cases being presented by Barristers equipped, not only with their ordinary forensic qualifications, but with the added influence of their Parliamentary standing, and with the added influence of their known Temperance proclivities.

And (7) That the Temperance Cause has suffered an additional detriment by the appearance of insincerity involved in the advocacy of Liquor Trade interests by Temperance representatives.

It is altogether fallacious to differentiate between the occasions for the exercise of the profession of an advocate. A licensing application has no features which differ from those of any other application in administrative matters involving the exercise of judicial functions, including in judicial functions judicial discretion. The grant or refusal of a licence to sell liquor is not merely the grant or refusal as a matter of favour, of a personal privilege, advantage or profit. The decision on a licensing application must have always an aspect of public expediency, and often an aspect of selection as between rival claimants.

Now, as to the political or electoral aspect of the question I say nothing. There may or may not be, from the point of view of the whole community, or from the point of view of a particular electorate, justification or expediency for extracting or enforcing an electoral pledge involving a professional disqualification or limitation.

But the right to retain a particular advocate in so far as it exists, is the right of the client. The obligation of an advocate is to do nothing in derogation of the rights of his clients whether his clients be past, present, or future. Any pledge given by an advocate which is in deviation from professional obligations is nugatory, as against a person who is entitled to rely upon that professional obligation. In other words, no bargain between an electorate and its representative, limiting the freedom of professional action of the advocate, as the price of a seat in Parliament, can deprive the client of his right to the services of that advocate. If an advocate has surrendered his right to appear for any client who desires to retain him, or has excluded a particular client or a particular group or class of clients, as his part of the electoral bargain, he has placed himself in a dilemma. He must cease to be a member of the Bar liable to be retained, or he must cease to be the representative of a constituency seeking to enforce the bargain.

But the solution of the whole difficulty is to be found in the phrase "liable to be retained." I have in my article indicated the limits of the right of retainer. It does not extend to Courts other than those in which the advocate holds himself out to practice. If a Parliamentary bargain be in itself right and expedient, a bargain may be made without question between the barrister and his constituency that he shall cease to practice altogether, or that he shall cease to practice in particular Courts in which his services are likely to be requisitioned by the Liquor Trade or members thereof. Of course this disqualification will prevent the Temperance Party, equally with the Trade, from availing themselves of the services of an advocate with a Parliamentary standing, but it would undoubtedly prevent the appearance of insincerity, as well as the advantage to the Liquor Trade, of representation before Benches of Justices by known Temperance Reformers.

E. S. C-S.

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## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*"Principles of Company Law.* By ALFRED F. TOPHAM, LL.M.  
London : Butterworth & Co. 1904.

The general rule which contemplates that legal practitioners should carry a few leading principles of each branch of the Law of England in their heads, and should supplement these by special research, having regard to the particular case in hand, is one which certainly ought to obtain in connection with Company law. It is not infrequent to hear the most amazing ignorance of principle, and of the general scheme of the Legislature, manifested by those who have looked at a case from the point of view of decided cases and particular sections. The arrangement of the work before us is excellent, and gives just that amount of matter which the lawyer ought permanently to store in his brain. One small inaccuracy we have noted, but it is only of historical moment. The Author says that the Companies Act 1862 was the first statute to create companies with limited liability. Students—and it is for such, as we learn from the Preface, that the book is primarily intended—will be puzzled to know why an authority from the Reports of Ellis, Blackburn and Ellis, decided in 1858, should, if that were so, be cited as to the effect which follows in the case of the omission of the word "limited." The true facts are, of course, that the Limited Liability Act 1855 (18 & 19 Vict., c. 133) and the Joint Stock Companies Act 1856 (19 & 20 Vict., c. 47) had already introduced the principle of limited liability. But this is a very small blemish, and the book is one which we can recommend to lawyers.

*A Handbook of Sewer and Drain Cases.* By J. B. REIGNIER CONDER. London : The St. Bride's Press. 1904.

Professions other than the legal profession have of late years taken an ever-increasing interest in the decisions of Courts of law. And the Press, which caters for such other professions, have not been slow to recognise this. *The Surveyor* is an instance in point. Such newspapers not only place before their own readers decisions which in old days would have been known to lawyers alone, but they

often rescue from oblivion some decided point which would otherwise have never been so rescued. Mr. Reignier Conder has done work which was well worth doing in collecting a series of such "notes made at the time" into a book calculated to preserve them in a permanent form. Many of the cases so collected are actual legal authorities of binding force, though many others have no application to anything but the immediate facts upon which they were decided in inferior Courts. But the whole book is one which a surveyor may most usefully possess.

*An Outline of the French Law of Evidence.* By OLIVER S. BODINGTON. London: Stevens & Sons. 1904.

We do not know whether an English lawyer is often confronted by problems involving a reference to the French law of Evidence. In any case this book may be recommended to the student, if only for the excellent manner in which it indicates the contrast between the two systems. The rules of evidence, which with us are so complicated, and so constantly debated in our Courts of law, are by our neighbours condensed into a comparatively small number of articles in the Code. Mr. Bodington's book therefore is not of great range; but he appears to have done his work well. It will come as a shock to many to learn that the admission of any oral evidence in cases concerning over 150 francs is modern: and that even now no witnesses are heard in civil proceedings except in chambers (*l'enquête*). On the other hand, where oral evidence is admitted, it is admitted almost without restriction even as to "hearsay." The last chapter of the book is devoted to a comparison of the two systems. Mr. Bodington, after a somewhat violent onslaught on our jury system and a strong criticism of what he holds to be the exaggerated value of documentary evidence in France, concludes that each system might with advantage borrow something of the other. We do not think English lawyers will agree with him. We might observe by the way, that such anecdotes as the Author tells of the late Lord Russell of Killowen are hardly in place in a text-book. The book has an Appendix containing those Articles of the Code which deal with the law of Evidence under the heads, civil, commercial, and criminal. Mr. Bodington has wisely set the original French side by side with the translation.

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*Dictionary of Legal Quotations.* By JAMES W. NORTON-KYSHE. London: Sweet & Maxwell. 1904.

This selection of "dicta of English Chancellors and Judges, from the earliest periods to the present time," certainly does embrace "many epigrams and quaint sayings," and must be the result of wide and careful reading. It will not be so valuable to the practitioner as *Stroud's Dictionary*, but it will be more entertaining. The Author has unearthed many excellent phrases, and supplies materials and quotations for many an argument. Some of the quotations, however, can never be of any use, and are hardly even humorous. The quotation from Lord Ellenborough, in *Squires v. Whisken*, strikes us as being of this nature: "Cock-fighting must be considered a barbarous diversion." So is the statement of Pollock, C.B., that "Judges are philologists of the highest order," and that of Wright, L.C.J., "You shall have my judgment presently, but my brothers are to speak first." There are, however, many excellent quotations, and it is interesting to glance at the list of Judges quoted. By far the largest number of dicta are by Lord Mansfield; Coke and Kenyon are very close together for second; and we think Holt would be fourth. There are two or three little errors in the names and titles of the Judges in this list. Lord Bramwell is given as Bramwell, J., instead of L.J.; Lord Camden as Camden, J.: and the Earl of Clonmell as Clonwell. It is worth turning to the quotations from Maule, J., to read a few of the expressions of that remarkable Judge. Here are some of them: "Nominal damages 'are in effect only a peg to hang costs on'; 'Common-sense still 'lingers in Westminster Hall'; 'There is no presumption in this country that every person knows the law: it would be contrary to common-sense and reason if it were so.' After this last quotation and its reference, the Author has added "and characterised by 'Blackburn, J., in the *Queen v. Mayor of Tewkesbury*.'" What this means we cannot say. Some of the quotations from Lord Bowen are very happy.

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*The Law and Customs of War on Land.* By Professor T. E. HOLLAND, K.C. London. 1904. •

This Handbook, edited by the well-known authority on International law, Professor Holland, is published by the War Office in compliance with the undertaking contained in Article I of the Hague Convention 1897, for the information of all ranks of His Majesty's



land forces. In this Handbook His Majesty's Government have carried out their undertaking in a liberal spirit, as they have not only included in it the regulations annexed to that Convention, but also the Articles of the Geneva Convention of 1864, and the Declaration of St. Petersburg of 1868. There are, in addition to the Articles from these conventional Acts, others "expressing the still unwritten or customary laws of war," which the learned Editor has derived "from the most reliable sources"; and he has also added explanatory notes and an Appendix. This last contains lists of Powers, parties to the three Acts; Historical Notes on the three Acts; the Three Declarations (not binding upon Great Britain) set out in the Final Act of the Peace Conference of 1899. These three it will be remembered were against throwing projectiles and explosives from balloons; using projectiles, the sole object of which is to diffuse gases; the use of expanding bullets. The whole is well worth the perusal of all who are interested in International law.

*The Law of Limited Liability Companies in New Zealand.* By C. B. MORISON. New Zealand: Gordon & Gotch Proprietary. London: Stevens & Haynes. 1904.

From the Antipodes comes this laboriously compiled work, which is bound to be most useful to the practitioners of that distant part of the world, and which is by no means uninteresting to students of jurisprudence at home. Business men the whole world over feel the shock of any revolutionary suggestions made in this country as to Company law: and particularly in those regions where the law thereupon closely follows our own. Some dicta of the present Lord Chancellor and of Lord Davey, in *Dovey v. Cory* (L. R. [1901], A. C. 477), gave rise to great searchings of heart in New Zealand, where questions such as those discussed in that case are frequent and important, and where many companies are formed for the purpose of working wasting property. Those dicta form the subject of an important chapter in the work before us, and we learn that they have also been the occasion for legislative action in New Zealand, which will prevent the suggestions of the House of Lords from being effective there, even if, when these matters are decisively discussed at home, any different result may here occur. The chapter in this work on Profits and Dividends is an important contribution to its subject. The law of New Zealand relating to private companies as here set forth is also worthy of attention.

**Third Edition.** *The Law of Torts.* By J. F. CLERK and W. H. B. LINDSELL. This Edition by WYATT PAINE. London: Sweet and Maxwell. 1904.

We have here a worthy successor to previous editions of a valuable work. We should not ourselves agree with the view of the law of conspiracy set out on page 26. *Gregory v. The Duke of Brunswick* (6 M. & G. 953), and *Quinn v. Leatham* (L. R. [1901], A. C. 495), are there discussed. The Editor's view is interesting and well argued, and the work is sure to be consulted when the point arises. The question will certainly be raised some day in a typical case whether if two conspire to do what one may lawfully do, they may not, nevertheless, be liable in an action of tort. On this and all other parts of the subject the work contains all materials available for a thorough understanding of this particular branch of the law.

**Fourth Edition.** *Copinger's Law of Copyright.* By J. M. EASTON. London: Stevens & Haynes. 1904.

Eleven years have gone by since the third edition of this learned work appeared. The new one will be welcomed by lawyers concerned in this department of law. Scholarly in the extreme, with its apposite quotations from the classics and its clear exposition of its subject, the work of Mr. Copinger has long been the leading authority on Copyright. Mr. Easton has thoroughly revised the book, and the division into Parts is to be applauded. Some changes have been made in the order of the chapters, and a very considerable amount of new letterpress has been added. A paragraph has, for instance, been added in the Historical Review, dealing with efforts at copyright legislation subsequent to 1842. Certain important cases which have been decided since the last edition, such as *Walter v. Lane* (L. R. [1900], A. C. 539), deciding that a reporter is entitled to copyright in his verbatim report of a public speech, and *Parry v. Moring* and *Moffat v. Gill* (84 L. T., N. S., 452), are fully dealt with. One may, perhaps, without being hypercritical, object to the description of *Walter v. Steinkopff*, decided in 1892, as a "recent case": and we have noticed one or two trifling errata in the references to the footnote. The case of *Parry v. Moring* referred to is neither stated to be unreported nor furnished with a reference. Otherwise we can find no fault. The latest statutes, down to the abortive Musical Copyright Act of 1902, are included in the Appendix: and the Amending Bill which has hitherto failed to pass into law has been outlined in this book.

**Fourth Edition.** *Bunyon's Law of Life Assurance.* By J. V. VESEY FITZGERALD, K.C. London: C. & E. Layton. 1904.

There is, perhaps, no subject in the law where so many apparently elementary questions are wanting in authority as the law of Life Assurance. We do not in this connection speak of American cases, which, though highly respected in many instances by our Courts, have never been allowed to be "authorities" upon this side of the Atlantic. The best companies in England almost always pay rather than go to law. Mr. Bunyon's useful book does, however, collect all that it is most useful to have collected as to the English law upon the subject, and when the whole has been so collected it appears that there are more decided cases upon the subject than might have been supposed. The total is swelled by the inclusion of such cases as *Caddick v. Highton* (80 L. T. 527) and *Griffin v. Griffin* (L. R. [1902], 1 Ch., 135), which relate to "nominations" under the Friendly Societies Acts, and these are very properly considered to have a bearing upon this branch of the law. Mr. FitzGerald has done his work well and completely, and we have detected no error save that of an obvious misprint on page 161. The very important case as to the meaning of "obvious risk," *Cornish v. Accident Assurance Co.* (23 Q. B. D. 453), was decided in 1889 and not in 1899. The Author does not make any comment upon this case, but it is one which might well have been taken to the House of Lords.

**Sixth Edition.** *Seaborne's Law of Vendors and Purchasers of Real Property.* By W. ARNOLD JOLLY, M.A. London: Butterworth & Co. 1904.

Mr. Jolly in his Preface gives clearly and simply the object of his work; namely, "to furnish a concise manual of the Law relating to Vendors and Purchasers of Real Property, which, while it is sufficiently clear and elementary to be used as a text-book for students, may also be found by practitioners to be a convenient and valuable book of reference." It is not always very easy to combine these two qualities, but we think Mr. Jolly has, to a great extent, succeeded in doing so. It strikes us as a very good book for students, and its clearness and good arrangement render it a very handy work of reference. An idea of the arrangement of the work may be got by looking at the titles of the Parts into which it is divided. Part I, which is a short one, treats in the usual manner of the Contract of

Sale ; Part II goes at some length into the Capacity of Vendor and Purchaser, dealing one after the other with parties under disability ; fiduciary vendors and mortgagees ; limited owners ; and powers conferred by Land Clauses Consolidation Act 1845. The next two Parts are respectively "Of the Vendor's Title" ; "Of Investigation of Title and Conditions restricting the same." It is worth noticing the discussion on "interest on purchase-money" ; and the view taken as to how far the purchaser can escape liability to pay interest by depositing the purchase-money. Parts V and VI are on the "Rights of the Contracting Parties after the Contract and before Completion" ; and "Completion and Matters relating thereto." We think, perhaps, the question of registered land might have been gone into a little more fully.

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**Eighth Edition.** *Key and Elphinstone's Precedents of Conveyancing.* 2 Vols. By Sir HOWARD W. ELPHINSTONE, Bart., M.A. ; FREDERICK T. MAW, LL.B. ; and ERNEST M. BONUS. London : Sweet & Maxwell. 1904.

No book on Conveyancing is better known or more used than *Key and Elphinstone's Precedents*. The steady demand for it, and the laudable desire of the Editors to keep it up to date, are both shown by the issue of this edition only two years after the last one. We notice that there are two new Editors this time, Messrs. Maw and Bonus having taken the places of Messrs. Coltman and Dickson. One would not expect to find many alterations besides the general revision, but there are some. One of the most important is the adaptation of Business Contracts to modern requirements, by adding provisions for the payment of part of salaries by a per-centage, either on gross returns or on profits. In drawing these clauses care had to be taken, as explained in the note, that a partnership was not created. Another useful addition is that of a condition for determination of a continuing guarantee ; though, as pointed out in the note to that precedent, private bonds of that kind are probably much less common than formerly, owing to the action of the guarantee societies. The Conditions of Sale have been re-arranged, and a provision given "partially exonerating a purchaser who is not in default from payment of interest in case of delay in completion." A new form of Contract of Sale is an Agreement for Sub-sale of real estate, pending investigation of title, at an increased price to be endorsed on original contract. Another new precedent which is

likely to be of considerable use is one of a conveyance to a Parish Council for a recreation ground. A new heading of considerable importance is one contained in the second volume, and entitled "Mortgages as affected by the Land Transfer Acts." This consists of a valuable preliminary note of five pages, and sixteen precedents. Some noteworthy alterations will be found in the modifications of the clauses relating to policies. To obviate the inconvenience which often arises when trustees desire to purchase a residence, or lend on the mortgage of a house held on a shorter term than that authorised by the settlement, the Editors suggest that "the trustees should be allowed to purchase, or lend money on the security of leaseholds held for short terms, on taking out a sinking fund policy, to replace the purchase or mortgage money at the end of the term." To carry out this design such a power is inserted in a precedent of investment clause, and further precedents are given of direction to effect such policy, and covenant to keep it up. There is also a little clause suggested to meet the case of husband and wife quarrelling, after the fortune of one of them has been invested in a house, to the sale of which the other refuses to consent. We may conclude with calling attention to two points which, we think, show the value of this work. If the power of attorney in the recent case of *In re Dowson and Jenkin's Contract* had been drawn in accordance with the precedent given here to sell, etc., real personal estate, the difficulty would not have arisen; and the learned Editors foresaw the probability of the decision given in *Woodall v. Clifton*, that an option to purchase like the one in that case was within the rule against perpetuities, and suggest the addition of a proviso to meet the difficulty. It is worth noticing that the Editors have found it difficult to frame an effectual penal clause to insert in Agreements in restraint of trade as to liquidated damages.

**Eighth Edition.** *Powell on Evidence.* By J. CUTLER, K.C., and C. F. CAGNEY. London: Butterworth & Co. 1904.

Upon no branch of the law, perhaps, have so many scholarly treatises been written as upon the complex rules of evidence: yet *Powell* holds its own among a large crowd of formidable competitors. This, the eighth, edition is dedicated to the Lord Chief Justice. It is pointed out in the Preface that certain matters, mainly of historical interest, have been eliminated, with the result that although much new material is included, the present edition is several pages shorter

than the last. The Editors appear to have done their work carefully. A number of recent cases have been added, including several on the Criminal Evidence Act 1898. The method of enunciating principles in large type is, we think, one to be heartily commended.

**Tenth Edition.** *The Law of Stamp Duties on Deeds and other Instruments.* By E. N. ALPE; revised and amplified by ARTHUR B. CANE. London: Jordan & Sons. 1905.

This work is too well-known to require much comment. It is recognised as one of the best treatises on this intricate and technical subject. All the cases, and what official information can be obtained, are given. Since the last edition only one Act touching the subject has been passed; but there have been some important decisions. Of these Mr. Cane discusses the somewhat peculiar decision in *Eastbourne Corporation v. Attorney-General* at some length in his Preface. He also calls special attention to the cases *Attorney-General v. Regent's Canal and Dock Co.*; *Mount Lyell Mining etc. Co. v. Commissioners*; *Underground Electric Railway of London v. Commissioners*; *Thomas Firth & Son v. Commissioners*; and *Prudential Assurance Co. v. Commissioners*. The notes are full, and, when necessary examples are given, as, for instance, under the heading "Settlement," there is an assessment of Settlement Duty on a Settlement where funds of a very varied nature were brought in. We think that a vast number of so-called "receipts" must escape duty.

**Tenth Edition.** *Redgrave's Factory and Truck Acts.* By N. S. SCRIVENER and C. F. LLOYD. With Statutory Orders, Special Rules and Forms, revised by W. PEACOCK, of the Home Office. London: Butterworth & Co. 1904.

With the exception of the Employment of Children Act 1903, there has been no legislation affecting this branch of the law since the last edition of the book; but, as the Editors explain, a number of recent decisions have made a new edition desirable. All these recent decisions appear to be included. The Truck Acts have been transferred from the Appendix to the body of the book and preceded by a very useful historical introduction, showing the causes which led up to the passing of each Act, beginning with that of 1831, which was aimed at the "tommy-shop," and concluding with the Hosiery Manufacture (Wages) Act 1875.

**Fourteenth Edition.** *Chitty's Treatise on the Law of Contracts.*  
By J. M. LELY. London: Sweet & Maxwell. 1904.

In the admirable Preface to his book Mr. Lely points out that, notwithstanding the numerous enlargements in the present edition, which include a new discussion of the law concerning club contracts, and an extended treatment of marriage contracts, Stock Exchange contracts, and contracts between landlord and tenant, the book is hardly larger than its predecessors, this being due to compression of redundancies and to the more frequent employment of smaller type. There have been many important decisions touching the law of contracts since the publication of the last edition in 1896. Among these are *Keighley, Maxted & Co. v. Durant* (L. R. [1901], A. C. 240), on agency; *Shipway v. Broadwood* (L. R. [1899], 1 Q. B. 369), where the offer of a secret commission was held to avoid a contract; and *Kech v. Henry* (L. R. [1903], 2 K. B. 740), and *Chandler v. Webster* (L. R. [1904], 1 K. B. 493), as to impossibility of performance. These and many other recent cases are all adequately dealt with. We should have expected to find more extended reference to *Allen v. Flood*, although perhaps strictly outside the domain of a book upon the law of Contracts. The important copyright decision by the House of Lords, *Affalo and Cook v. Lawrence Bullen and Co.*, is treated at some length, and the Editor respectfully submits that the judgment is wrong in point of construction of the Statute. When, however, the judgment discussed is that of the House of Lords there is no great usefulness in such submissions, though in respect to other Courts they are not to be discouraged. As in previous editions, there appears a list of points of Contract law requiring remedial legislation, headed once again by *Pott v. Clegg*, deciding that money at a bank not drawn upon for six years becomes the property of the banker. As the date of the decision was 1849, we fear that another edition of Chitty, or even more, may be necessary to obtain the reform desired. Upon the whole we may say that the new edition sustains the reputation of this great work. The Index and Table of Cases are as carefully prepared as usual: and we could wish that others would follow the plan of printing the more important cases in large type.

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## CONTEMPORARY FOREIGN LITERATURE.

*Les Institutions Juridiques des Romains.* Second Edition. Vol. i. *L'Ancien Droit.* By ÉDOUARD CUQ.\* Paris, 1904.

This is perhaps the best work on the subject within a small compass in existence. This edition contains comparisons, so says the preface, of the Code of Hammurabi and of the papyri published by the industry of Drs. Grenfell and Hunt. This volume contains some interesting allusions to the Code, especially in the law of obligation, but no reference—after the Preface—to the papyri. One can only suppose that they will appear, as is natural, in the volume dealing with the later law. The number of English authorities in the bibliography and notes is conspicuously small; Maine, Tylor, Muirhead, and Roby are named, but the Professor appears to be ignorant of the learned works of Dr. Greenidge. As examples of thoroughness and clearness, coupled with brevity, the reader may with advantage consult the chapters on mancipation and the interdict.

*Bibliographie Générale et Complète des Livres de Droit et de Jurisprudence.* MARCHAL & BILLARD. Paris, 1904.

An annual always useful and full. This one up to 6 Nov. 1903, though probably not complete, will be found invaluable as a guide to publications, chiefly French, on various branches of law.

## PERIODICALS.

*Journal du Droit International Privé.* Nos. VII—X. Paris, 1904.

This number is full of interest. Among the articles is one by Mr. W. F. Craies on the development of Extradition in the British Empire from 1901 to 1903, with some decisions of Colonial Courts not otherwise easy of access. Among the judgments of foreign tribunals attention may be called to those on pp. 973, 983, and 987. In the first the civil tribunal of Brussels held that an English joint stock company suing in Belgium could be called on to give caution *judicatum solvi* on the ground that sect. 69 of the Companies Act, 1862, provided for security in a proper case, and



that such provision was a part of the personal statute of the company. In the second the Supreme Court of Indiana held *inter alia* that, failing evidence to the contrary, the Courts of one State of the Union ought to presume that the legislation of another State is in conformity with the Common law, *Baltimore & Ohio R. R. Co. v. Read* (62 N. E. Rep. 488). The third case is a somewhat belated report of the important decision given at Rome in 1898 of *Monami v. Monelli*. The point was that the Holy See is a *persona morale* and so can be instituted heir or legatee. But if so instituted it cannot enjoy without the authorisation of the State, pursuant to the law of 5 June, 1850. Compare the English licence in mortmain.

*Deutsche Juristen-Zeitung.* Nos. XIX—XXIV. Berlin, 1904.

The number of 1st October contains memorial articles in celebration of the twenty-fifth anniversary of the real beginning of central jurisdiction in the German Empire, which may be dated from 1st October, 1879. They are all by veteran jurists who were in practice in 1879. At p. 964 is an account of the twenty-seventh *Juristentag*, held this year at Innsbruck, one of the rare occasions on which German jurists have gone beyond the bounds of the Empire. At p. 1050 is a discussion by Dr. Niemeyer of the international position of the Dogger Bank question. He seems to reduce it to a question of necessity, the necessity determinable by evidence. He perhaps somewhat strains the maxim of Grotius on which he relies, *omnia licere in bello quæ sunt necessaria ad finem belli*.

*Giustizia Penale.* Fasc. XXXIX—XLIX. Rome, 1904.

There are in these numbers comparatively few decisions of interest to English lawyers. For instance, a considerable space is occupied at p. 1262 in determining that a commune can be a *parte civile* in a prosecution for encroachment on a highway. At p. 1300 the Court of Cassation decided that a person who furnishes a room and weapons for a duel is an accessory to the principals and not to the seconds. Accordingly he may be convicted although the seconds have been acquitted. At p. 1482 is a decision in a case of *Liebig's Extract of Meat Co. v. Erba* to the effect that where an order is given to a tradesman for Liebig's Extract and an inferior article is

supplied in answer to the order, the tradesman is guilty of *frode in commercio* under Art. 295 of the Penal Code, although no artifice or alteration of label has been employed. In such a case in England the only remedy would apparently be a civil action, as the proceeding would hardly fall within the Adulteration Acts.

JAMES WILLIAMS.

## WORKS OF REFERENCE.

*The Lawyer's Companion and Diary for 1905.* Edited by E. LAYMAN, B.A. London: Stevens & Sons.—This well-known work of reference has now reached its fifty-ninth year, and the present issue maintains the high standard of excellence reached by the preceding ones. Among the principal contents are lists of judges, barristers, and solicitors; tables of costs, stamp, estate, legacy and succession duties, and a list of the Public Statutes of 1904. The arrangement of the contents is excellent, and a good index greatly facilitates reference.

*The Lawyer's Remembrancer and Pocket Book for 1905.* By ARTHUR POWELL, K.C. London: Butterworth & Co.—This, the eighth annual issue, has been carefully revised to date. In the diary section the space allotted to each day has been doubled, and this should prove a convenience to users of this very handy little work. The Sale of Goods Act, with notes thereon, forms the special article for the year.

*Fry's Royal Guide to London Charities, 1905.* Edited by JOHN LANE. London: Chatto & Windus.—We need scarcely point out the amount of good that must be done by this publication which is designed to show the poor where to look for help, and to point out to the rich the Institutions most deserving of their support. The body of the work consists of a comprehensive list, arranged in alphabetical order, of London charities, while a form of bequest and an appendix, containing more detailed particulars of the majority of the Institutions, go to make up a work of reference which must be extremely useful to solicitors and others who may be called upon to advise as to the distribution of money for charitable purposes.

*Who's Who Year Book for 1905.* London: A. & C. BLACK.—The Tables of which this little work is made up formerly were part of *Who's Who* itself. Many fresh and interesting tables have been added in the present issue, and much useful information is given in a concise and handy form.

*Who's Who, 1905.* London: A. & C. BLACK.—With the inclusion of many fresh biographies and much additional matter from year to year, this work is assuming somewhat bulky proportions, the biographical section alone now

occupying 1,800 pages, an increase of 100 pages over last year. The book has earned for itself a reputation for accuracy and completeness which it highly deserves and which the present edition well maintains. It is, of course, impossible to thoroughly test the contents of a work of this nature, but so far as we have been able to do so we have found the information given to be full and accurate.

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*The Englishwoman's Year Book and Directory, 1905.* London: A. & C. BLACK.  
—An extremely useful work of reference for women and all interested in woman's work. Some of the principal subjects dealt with in the work are Education, Employment and Professions, Temperance, Philanthropy, Science, and Literature; and although the work does not aim at dealing exhaustively with these matters the information contained in it will be found of the greatest assistance, and must considerably lighten the burden of the busy woman worker.

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Books received, reviews of which have been held over owing to pressure on space:—*Annual Practice, 1905*; *A.B.C. Guide to Practice*; Bund and Stephen's *Agricultural Holdings*; *Yearly Supreme Court Practice, 1905*; Edwards' *Law of Property in Land*; Jelf and Hurst's *Law of Innkeepers*; Macnamara and Neville's *Summary Convictions*; Warde's *Interpleader by Sheriffs and High Bailiffs*; Pratt's *Income Tax*; Selden Society's *Publications*, Vols. 18 & 19; Williams' *Vendor and Purchaser*, Vol. 11; *Indermaur's Principles of Conveyancing*; Wiener's *Studies in Biblical Law*; Mitchell's *The Law Merchant*, Paterson's *Practical Statutes*; Manson's *Bankruptcy Law*; Saunderson's *Precedents of Indictments*; Nicolas' *Patent Act 1902*; Pollock's *First Book of Jurisprudence*; Davidson's *Precedents of Conveyancing*; Watt's *Law of Savings Banks*; Emden's *Winding-up of Companies*; Lely's *Annual Statutes, 1904*; Emanuel's *Landlord and Tenant*; Glynn-Jones's *Companies Acts 1862-1900*; Duckworth's *Law of Partnership*; Fawcett's *Landlord and Tenant*; Snell's *Principles of Equity*; Montgomery's *The Licensing Laws*; Rothera's *Licensing Act 1904*; Schwabe and Branson's *Law of the Stock Exchange*; Gai's *Institutiones Juris Civilis*; Marchant's *Barrister-at-Law*; *Encyclopædia of Forms and Precedents*, Vol. VII; Foyster's *Magisterial Handbook*; *Every Man's Own Lawyer*.

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Other publications received:—Solberg's *Revised Statutes relating to Copyright* (Library of Congress, Washington); *Judicial Statistics, Part I*; Hozami's *The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence*; *Revista de Direito*, No. 1 (Lisbon).

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The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews*, *Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

# THE LAW MAGAZINE AND REVIEW.

No. CCCXXXVI.—MAY, 1905.

## I.—*NULLIUS FILIUS*: "THE STRANGER IN BLOOD."

IT has long been the invariable and almost unquestioned practice of the Inland Revenue authorities at Somerset House to describe legatees and successors who happen to be of illegitimate birth, although they may be naturally related to the predecessor, as "strangers in blood" to him, and consequently to charge them with the highest rate of duty payable, namely, ten per cent. Occasionally, exception is taken by a legatee or successor to this method of description, and the authorities then permit some periphrasis to be used, such as "a child, but of no legal affinity to the deceased"—"a person in respect of whom duty at the rate of ten per cent. is offered"—"a stranger to the deceased"—"a person of no collateral consanguinity to the deceased." Apart from the fact that this does not avoid the grievance of paying ten per cent. instead of one, there is the further objection that it contravenes the explicit direction contained in the Inland Revenue forms, that "the description of the legatee *must* be in the following words of the Act, etc." The assumption that persons of illegitimate birth are "strangers in blood" to their natural relatives, it is submitted, is one that cannot be sustained, and if this be so the Revenue evidently has, for many years past, profited at the expense

of a class of persons who are naturally unwilling to resist the claim at the cost of making public their origin. These cases are most frequent in the transmission of property, necessarily by will or settlement, from parent to child. Illegitimate children, therefore, pay ten times the amount exacted from those who are of lawful birth. If the kinship is more distant, as a first cousin, the successor still pays ten per cent.; that is to say, only twice the amount exacted from persons who are lawfully related in a similar degree. Hence the practice pursued by the Revenue results, in the case of illegitimacy, in the nearer relative being treated in a harsher manner than the more distant one, the reverse result occurring in lawful kinship. Of course this is the necessary consequence of the assumption upon which the Inland Revenue officials base their practice, but none the less it results in an evident injustice.

In almost every Christian country illegitimate children have some right of succession, sometimes to the mother's property only, sometimes to that of both parents; the share of an illegitimate child usually being less than that of a lawful child. Those countries which do not permit the slightest right of succession are Russia, Sweden, Brunswick, two of the Swiss Cantons, and England, and also countries which follow the English Common law, namely, certain of the British colonies and the United States, though with the latter the rule is not universal.

When we remember how very stringent the English law of legitimacy is, and that this class is already under a very heavy disability, in their absolute incapacity to succeed to their deceased relatives' property, unless those relatives, by will or other instrument, choose to give it to them, we can see how severely the present interpretation of the Legacy and Succession Duty Acts presses upon them.

That this invariable practice of the Inland Revenue authorities is wholly unjustifiable we shall now attempt to

show, from a consideration of the manner in which illegitimacy and its disabilities are regarded in our law. These considerations are equally applicable to the question as to what amount of legacy duty is payable by all illegitimate relatives of any degree, and for this reason we need only discuss the case of parent and child.

The social discredit of illegitimacy and its incapacities are the necessary consequence of the requirement that some overt evidence, in prescribed form, must be produced in support of the allegation that any two persons have entered into the marriage relation. That some evidence, more or less formal, is needful may be taken as universally admitted, for without some testimony of this nature, uncertainty would arise in the attempt to ascertain the relative rights and duties of the new family group, and the Courts would, of necessity, be frequently involved in special inquiries which they seek to avoid, and which in some codes of law are expressly forbidden, by demanding some ceremony, or at least the public reputation of a mutual consent, to establish the fact that the special relationship of marriage has been entered upon. What the ceremony is to be, whether civil or religious or both combined, is a matter for each State to determine. The maxim of the Civil law was *pater est quem nuptiae demonstrant*, and indeed is also the presumption of our own law though a *primâ facie* one only. In modern times, a legal method under the Bastardy Acts has been provided for ascertaining the paternity of illegitimate children.<sup>1</sup>

These last Acts have no doubt remedied much hardship, but it may perhaps be fairly questioned whether they do not sometimes derogate from the value of the marriage tie in the lower ranks of life, in which the sum for maintenance obtainable from the putative father may be commensurate

<sup>1</sup> Under these Acts it is possible that the paternity of a child may be laid upon a man who has never even heard of the summons or of any of the proceedings taken against him by the mother. *Reg. v. Damarell* (L. R., 3 Q. B. 50).

with the social position of the parties. It is important to observe that the English Bastardy Acts seem to be as direct an acknowledgment of illicit parental relations as is possible for any law to permit, without rendering the institution of marriage altogether nugatory.

The evidence usually required to prove the fact of marriage, without compliance with which neither party has any claims against the other, except under the provision for maintenance of the offspring given by the Bastardy Acts, is the performance of some particular ceremony by which the mutual consent to the contract of marriage is publicly signified. This ceremony may be either retrospective in its operation, or prospective only, as in England. Once, however, the fact of marriage is ascertained, certain legal rights and duties arise between the parties thereto, and subsequently between the parents and their children, without the necessity of any specific acknowledgment at the birth of each child.

Certain classes of persons, varying in every country, are not at liberty to intermarry. In most civilised societies restrictions against marriage are imposed upon those who are already married during the subsistence of the tie, and an absolute incapacity is placed upon those who are related in certain degrees of kinship or marriage affinity, but what these degrees are varies, not only between foreign countries, but even within the limits of the British Empire. Very many of the cases of illegitimacy which supply the revenue with the highest rate of duty arise from marriages with a deceased wife's sister, and more commiseration is often expressed for the children of these unions than for the issue of a concubinage, or for those whose parents have made amends for their disregard of legal forms by subsequent marriage. Yet in the former case, as the law now stands, we have an incestuous union, and on that account it might well be thought that less sympathy would be shown with it than with the latter.

With the effects of marriage or the want of it upon the relative rights and duties of the parties themselves we have here no concern. Our attention is concerned with its effect upon the legal status of the issue. The children of a lawful marriage are subject to no disabilities in respect of their birth, and possess in England the right or privilege of succeeding in case of intestacy to a part or the whole of their deceased parents' property, and of deriving from them such titles of honour as may be hereditary. The absence of marriage, on the other hand, deprives them of these privileges, and nominally at least, for this has long since become obsolete, inflicts upon them the incapacity of entering into holy orders. This latter class in England are now known by the common generic description of "bastards."<sup>1</sup> The civilians, on the other hand, divided those of illegitimate birth into two, or perhaps rather, three classes, the *liberi naturales* and the *vulgo concepti et spurii*. The *liberi naturales* were those whose parents laboured under no incapacity for marriage, and who indeed could legitimate their children by a subsequent marriage. They were, in fact, the issue of the legalised concubinage or *quasi* marriage of Roman law, which seems to have its parallel in the morganatic marriages of some modern European States. In this country the issue of a continental morganatic marriage is legitimate, and as the English law does not recognise varying grades of marriage, in this country the usual rights of succession must belong to the children, although that may be not the case in the country where the marriage was solemnized. The *vulgo concepti* were the offspring of promiscuous intercourse, whose fathers were unknown, while the *spurii* were the children of forbidden, that is, of adulterous

<sup>1</sup> "Natural children" is a term frequently used as a euphemism for the term bastard. But the former term is, as we shall see, ambiguous, being equally applicable to lawful children, and therefore it is preferable to use the expression "illegitimate children."



or incestuous connections. The first expression has given us the term "natural children," which is often so extended in England as to include the latter classes, to whom with more propriety the term "bastard" might be exclusively applied. In common speech, the terms "bastard" and "natural child" are practically interchangeable, although under the Civil and Canon laws the latter term is applicable only to the issue of an acknowledged concubinage, or to those who have become legitimate by the subsequent marriage of their parents. We have seen that the Common law classes together the issue of simple concubinage and the *spurii*, the offspring of a forbidden alliance, although the civilians with more reason drew a distinction between them. The Roman law and those systems of jurisprudence derived from it have always recognised the possibility of legitimating the children of a concubinage, and the Canon law even went further, although the Church has ever taken a stringent view of the relations of the sexes, and permitted the legitimation of the natural children of any persons between whom no incapacity for marriage existed.

Our law however, in this point standing almost alone, has always refused to recognize the practice of legitimation *per subsequens matrimonium*, or by any other method except the transcendent power of Parliament, of which, perhaps, the only instance was the legitimation of the children of John of Gaunt and Katherine Swinford. This indeed was definitely settled so long ago as 1236 by the answer of the barons of England, "*Quod nolunt leges Angliæ mutare,*" when at Merton the clergy sought to assimilate in this respect the rules of the Common law and the Church, which, as we have seen, was more indulgent and charitable to the failings of individuals to comply with ceremonial law than even the civilians. However, the English law, although it has steadfastly refused to acknowledge, in any degree, the civilian doctrine of legitimation, draws a dis-

inction of little practical importance between those illegitimate children whose parents have subsequently married and those who have not. Members of the former class, who are canonically legitimate, it terms *bastard eigné*, and permits to them a slight and shadowy privilege in mitigation of the rule that bastards cannot inherit. This is the custom, that if a *bastard eigné* enter upon his paternal property and enjoy it till his death, his heirs cannot be disturbed by his younger and legitimate brother, the *mulier puisné* of our law French, "because," says Blackstone, "the law will not suffer a man to be bastardized after his death." With the exception, then, of this slight concession, all illegitimate children, of whatever class they may be; labour under the same disabilities in our law, viz., incapacity to inherit property in the case of intestacy, excepting, of course, that of their own issue, inability to succeed to any hereditary title, and, in theory, the obsolete disqualification for entering into holy orders. The first rule of law, the incapacity to inherit, is in practice rendered nugatory by testamentary dispositions, and as the others are of little importance, both affecting a very limited number, it seems clear that the social sanction and respect for *boni mores* and not legislative enactments, must form the most powerful bulwark we have in support of our marriage laws. Legislation has seldom ventured to impose penalties upon the real transgressors, and this means that practically our dependence must be placed upon the effect of public opinion, for the imposition of a penalty or punishment upon the innocent child, beyond the minimum disqualification necessary to distinguish the lawful child from the one born out of wedlock, would be worse than a hardship, it would be a palpable injustice. Yet this has been done within the last hundred years or so, not by any deliberate legislative enactment, but by mere administrative officers, in their interpretation of a revenue statute concerned with nothing

more than the collection of taxes. The Inland Revenue authorities have cast a heavy penalty upon illegitimate children by their assumption that the words "child" and "father," "mother" and "lineal ancestor," and "lineal issue," in the various legacy and succession duty Acts, apply only to legitimate relatives, and that those who happen to be illegitimate are "strangers in blood" to their nearest kindred. Stated thus plainly the assertion seems to carry its own refutation, if only the slightest attention be paid to the ordinary grammatical meaning of words, and it is at first sight hard to understand how any one could have enunciated such a strange proposition.

The expression "strangers in blood" evidently points to a total absence of all physical kinship, a condition of things which could not be stated more plainly by any amount of scientific periphrasis. It might be thought this expression would absolutely preclude all discussion upon the presumptive meaning in law of the word "child," and would avoid all disputed questions upon the rules determined on by law for ascertaining the relations of individuals. That this is not so, but that, on the contrary, the Inland Revenue has determined that sometimes a child is not a child, but a "stranger in blood" to its own parents, is clearly due to the familiar but mutilated maxim that a bastard is "*nullius filius*." If this be quoted in support of the Inland Revenue theory, it may quite as fitly be argued from the euphemism "*filius populi*," that a person of illegitimate birth must necessarily be the child of everyone, and consequently in every case of succession, whether to his own parents or to remoter relatives, chargeable with no higher duty than one per cent. This *reductio ad absurdum*, which has quite as much reason to support it as the contrary theory, is one, however, which is hardly likely to prove acceptable to the Chancellor of the Exchequer. But, however preposterous we may deem the doctrine that a natural child is

a "stranger in blood" to its own parents, it has taken such firm hold, and has been so little doubted, that a detailed inquiry into the question is rendered necessary.

The present legacy and succession duties are levied under the authority of several Acts of Parliament: the Legacy Duty Acts of 36 Geo. III, c. 52, 1796; 45 Geo. III, c. 28, 1805; 55 Geo. III, c. 184, 1815; the Succession Duty Act, 16 & 17 Vict., c. 51, 1853; the Customs and Inland Revenue Act, 44 Vict., c. 12, 1881; 51 Vict., c. 8, 1888; and the Finance Act, 57 & 58 Vict., c. 30, 1894. The earlier Legacy Duty Act did not impose any charge on children, and therefore need not be here referred to. By these Acts legatees and successors are divided into five classes, each of which is taxed at a different rate. These classes in the Legacy Duty Acts are:—

- (1) Child or any lineal descendant of a child or any lineal ancestor, who formerly paid one per cent., but now are exempt when estate duty has been paid;
- (2) Brothers or sisters, or their descendants, paying three per cent.;
- (3) Brothers or sisters of the parents of the deceased, or their descendants, paying five per cent.;
- (4) Brothers or sisters of the grandparents of the deceased, and their descendants, paying six per cent.;
- (5) Persons in any other degree of collateral consanguinity,<sup>1</sup> and strangers in blood, paying ten per cent.

The last four classes are defined in similar terms in all the

<sup>1</sup> When legacy receipts are to be filled up, the expression "any other degree of consanguinity" is to be used; but when filling up the accounts for succession, the phrase "of more remote consanguinity" must be adopted. Why there should be this difference of phraseology it is probable that not even a Somerset House official could explain.

Acts; but the Succession Duty Act describes children and their descendants as "lineal issue," an expression which has the merit of conciseness, though it would perhaps have been better draughtsmanship had the terminology of the earlier Act been adhered to.

The points which must be considered are, first—the meaning of the words "child," "father," "mother" and "lineal ancestor," under the Act of 1815, and "lineal issue" and "lineal ancestor" under the later Acts. It probably will suffice to discuss the meaning of the definition of the earlier Act, as it is not unfair to assume that whatever meaning we attach to "child," "father," "mother" and "lineal ancestor," is equally applicable to the conciser phrases of the Succession Duty Acts. Secondly, we must consider under what class of legatees illegitimate children must be placed, and it must be remembered that similar reasoning will apply to all relatives who trace kinship through illegitimate sources. It is clear that such are not included in the second, third, or fourth classes, and the alternative therefore is that they are either "children" or else "persons in any other degree of collateral consanguinity or strangers in blood." It has never been suggested that they are collaterals, so that the point is narrowed down to this, that they are either "children" paying one per cent., or "strangers in blood" paying ten per cent., or else that they are included in neither expression, in which case they would escape all payment of duty; though it is scarcely reasonable to think that the Legislature intended to invest the class of illegitimate children with a special privilege of so valuable a character as exemption from payment of legacy and succession duty. And as special importance is attached to the oft-quoted expression, *nullius filius*, we must discuss its exact origin and meaning as well as that of the word "child," and show how far "child" includes an illegitimate child, before we can absolutely say that such a one is a "child"

within the meaning of the Legacy and Succession Duty Acts.

The expression "stranger in blood" is one that does not appear to have been investigated or explained by any of the books, and it seems to have been first used, or at any rate brought into legal prominence in 1796, by the Legacy Duty Act (36 Geo. III, c. 52), and continued in the Acts now under discussion. Unlike such expressions as "children" or "heirs," it had no peculiar technical signification, and that being so it seems reasonable to give it an ordinary grammatical meaning, namely, to designate those persons between whom no natural physical kinship exists, that is, those who cannot trace their descent from a common ancestor. Had the words "in blood" been omitted, and the word "stranger" only used, a loophole would have been opened for those who, though not related to the testator, were at the same time well-acquainted with him, and who could say that as neither "collateral" nor "stranger" in the ordinary acceptance of those terms applied to them, they were therefore exempt from duty. And this might have been very plausibly urged in the case of foster relatives. But the addition of the words "in blood" clearly point to a natural kinship, such, in fact, as exists between an illegitimate child and its parent. So strong and definite an expression ought from every common-sense point of view prevent any other meaning attaching to the words. The contrary and usually accepted theory implies the intentional introduction of a legal fiction, and this at the date of the Act, 1796, is, to say the least of it, highly improbable. We have suggested that the common legal dictum that a bastard is *nullius filius* is the foundation of the Inland Revenue theory. The transition from this maxim to the assertion that an illegitimate child is a "stranger in blood" to his parents appears very easy, and at first sight a necessary consequence, but in truth, the very premise upon which this theory is built is a false one, for the

phrase *nullius filius* is an expression or simile taken in a mutilated form from Littleton, and, when read with its context, by no means supports the absurd statement that an illegitimate child has no father. It occurs in a passage of Littleton's *Institutes*, in which that writer refers to what must, in the middle ages, have been a valuable privilege to illegitimate children in the lower ranks of life, and one which might well have been envied by those of lawful birth. He writes, "Also no bastard may be a villein, unless he will acknowledge himself to be a villein: for he is in law *"quasi nullius filius*, because he cannot be heir to any." In this respect the English Common law is superior to the Civil law in which the issue of a slave mother followed her status with its accompanying disabilities. Thus we see that this great writer does not enunciate any such statement as that an illegitimate child is parentless: all that his assertion amounts to is, that with regard to a particular disqualification he resembles one in that position. But the phrase taken out of the context, deprived of the qualifying word "*quasi*," and put into a sentence as the predicate of the subject bastard, has caused all this mischief, and supplied foolish arguments to those who deduce their theories from words and phrases, rather than from plain facts.

Now, as to the meaning of the word "child." Clearly, apart from all legal technicalities, it signifies one who is immediately descended from another, and is, in fact, a general and inclusive expression meaning both a "natural" child and a "natural and lawful" child. It does not indicate primarily the one more than the other, although at the first sight, to those inquiring into the methods of interpretation of wills, this may seem to be the case. For it has been decided, and must be taken as an admitted rule of law, that a bequest to "children," without the addition of any qualifying words, excludes illegitimate children from the benefit of the

gift, unless a distinct intention that they shall share in it appears upon the face of the will, and if by any possibility legitimate children alone can satisfy the terms of the bequest, then illegitimate children will not take.

Thus, if a testator, having both legitimate and illegitimate children, devises property amongst his children without distinguishing them by name, the former alone can derive any benefit from the gift. It may be said that the latter, by reason of the circumstances of their birth, labour under a disqualification, *i.e.*, that being illegitimate they cannot inherit. This may be so, but there is no pretence of saying that they are not the testator's children. Perhaps, however, we may better put it thus: Illegality of action must be imputed to no one without clear evidence; and therefore, when a testator refers to "children," the law assumes that he means lawful children, since he has not in any distinct manner pointed out illegitimate children, although it was in his power to do so. Hence, as in such a case, the lawful children have all the requisite qualities to satisfy the terms of the gift, they accordingly receive the benefit of it. The evidence which admits the lawful children is ready at hand in the form prescribed, while to include illegitimate children it might be needful to enter upon a special inquiry, which the Courts decline to do so long as the terms of the will can be otherwise satisfied. But the word "children" will be interpreted to mean illegitimate children if a distinct intention that they are to benefit appears on the face of the will; as, for instance, in the case of a bachelor's will in which a gift to his "children" necessarily involves illegitimate children, because it is impossible for him, while the will exists, to have lawful children, since it is cancelled by his marriage, the fact which permits to him the possibility of lawful issue. The law does not commit such an absurdity as to characterise this as an impossible bequest, on the ground that a bachelor's children are "strangers in blood" to him, and therefore no children at all.



But the decisions of the Courts now tend to a wider recognition of the claims of illegitimate children, for though "public policy," the modern form under which, in some degree, the English judiciary claims to act as a *censor morum*, will not, on the ground of its immoral tendency, permit a gift to the future illegitimate children of any person; yet this is so far limited that a general bequest of this nature is sustainable if the children come into being and acquire such a reputation before the testator's death. But the question whether gifts to future illegitimate children are valid is clearly of a very different nature from that to "children," when illegitimate as well as lawful children, or the former class only, are actually in existence at the date of the gift. The one is a matter to be determined by public policy, the other is merely a question of the interpretation to be attached to the terms used by the testator.

W. P. W. PHILLIMORE.

*(To be continued.)*

## II.—NOTICE OF SUSPENSION OF PAYMENT IN BANKRUPTCY.

BY sect. 4 (1) (h) of the Bankruptcy Act 1883 "a debtor commits an act of bankruptcy"—if he "gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

This act of bankruptcy was newly created by the Act of 1883. The enactment looks simple enough, no doubt, but when it comes to be applied to the ever-varying actualities of life, difficulties at once present themselves. What does the statute mean by "gives notice"? Does a casual remark in the course of conversation, that the

person speaking has not the means of meeting his liabilities, amount to giving notice, or must it be a deliberate and formal one? What must be the nature of the information imparted by the notice? Does it depend on what the words used by the debtor say, or what the creditor to whom they were addressed took them to mean? Does the most deliberate statement that a debtor cannot or will not pay a particular creditor fall within the Act if the debtor gives no intimation as to how he intends to deal with his debts as a whole? The enactment had not long been in operation when such questions as these began to present themselves.

The Bankruptcy Act 1883 came into force on the 1st January 1884, and the first case on this provision came before the Court on a petition presented in March 1884. It was the case of *Ex parte Nickoll, In re Walker* ([1884], 13 Q. B. D. 469), where it appeared that the debtors, who were indebted to, among others, a Mr. Game, in a conversation they had with him on the evening of the 26th February 1884, distinctly told him that they had suspended payment in consequence of their bankers having allowed their bills to be returned. It was argued that this was not giving notice that the debtors had suspended payment within the meaning of the Act. That a mere conversation like this was not enough; that there must be a formal notice by means of a written or printed circular sent to the creditors or one of them. The Divisional Court (Mathew and Cave, JJ.) decided against this contention without giving any reasons, and held that notice had been given within the Act.

The next case—*Ex parte Oastler, In re Friedlander* ([1884], 13 Q. B. D. 471)—arose only a few weeks after, and seemed to put a directly opposite construction on the sub-section. It appeared that the debtor Friedlander, in conversation with one of his creditors, had stated that he was unable to pay his debts, and offered a 20 per cent. dividend. It

was argued by Mr. R. Vaughan Williams, now the Lord Justice, that this was an act of bankruptcy, and he cited *Ex parte Nickoll*; but the Court of Appeal (Baggallay, Cotton and Lindley, L.JJ.) would have none of it, and unanimously held that no act of bankruptcy had been committed. The Court seemed to think the notice might certainly be by word of mouth;—at any rate, Lord Justice Cotton said there could be no question about that (p. 473); but they held that it must be formal and deliberate, something done by a debtor with a consciousness that he is “giving notice.” “An act of bankruptcy,” said Lindley, L.J., “is a serious matter.” Two of the members of the Court went even further. Baggallay, L.J., said:—“Looking at sub-section 1 (f) I do not think that a statement by a debtor that he is unable to pay his debts can be regarded as equivalent to a notice that he is about to suspend payment of his debts.” Cotton, L.J., likewise said, “the debtor did not in fact intimate either that he had suspended payment of his debts or that he had any intention of stopping paying his creditors. He only said ‘my assets are insufficient to pay my debts in full.’ . . . To my mind there is a great difference between saying, ‘If all my assets are distributed my creditors will not get 20s. in the pound,’ and saying, ‘If any creditor comes to me in the ordinary course for payment, I shall not pay him,’ or ‘I have suspended payment of my debts.’”

Both these cases were cases of information given in casual conversation; the next case, which occurred the following year, was of a different kind. It was *In re Walsh, Ex parte the Trustee* ([1885], 52 L. T. 694). The debtor, having consulted his solicitors about his affairs, on their advice had summoned a meeting of his creditors on the 13th June 1884, at which he offered a composition of six shillings and eight pence in the pound. At the meeting it was resolved that Walsh should hand over all his property to a trustee, and

that a committee of inspection should be appointed. The committee reported unfavourably and the composition was not accepted, and the question was whether the offer of the composition was a notice of suspension of payment. It was argued by Mr. Kennedy, now the Judge, that this was different from *Friedlander's Case*, because there was here a formal meeting of creditors at which a definite statement had been made. But the Divisional Court (Cave and Wills, JJ.), relying on *In re Friedlander*, held that no act of bankruptcy had been committed; and Mr. Justice Wills went so far as to say that even if the debtor had said to the creditors at the meeting, "I am hopelessly insolvent," that would not have been a sufficient declaration (? notice) to satisfy the section.

Up to this point it seemed as if it was going to be a difficult thing to prove that a debtor had given notice of suspension of payment, but the tide turned when only a very few weeks afterwards the case of *In re Wolstenholme, Ex parte Wolstenholme* ([1885], 2 Morrell, 213), came before the Court. In this case the debtor's solicitors had issued two circulars to his creditors; one on February 9th 1885, in which they gave notice that a meeting of his firm's creditors would be held at a named place and time, when a full statement of the affairs of the firm and its members would be laid before the meeting, and a proposal made to try and save proceedings in bankruptcy being resorted to, "which is very evident must now be the case unless the creditors will agree to accept a composition." And went on to say that "*when the concern stopped* the liabilities amounted to about £1,600; the assets will not amount to more than £550, from which it will be seen that the deficiency will amount to about £1,000." This was followed by another, dated February 16th, in which, after explaining that the meeting had been abortive, and that the debtor was "completely ruined," they said, "through the kindness of friends, and by raising some money upon his furniture, we think he may manage to pay

ten shillings in the pound, provided all the creditors will accept it to save bankruptcy proceedings. If all the creditors will not agree there is no alternative but to seek the protection of the Court." The Divisional Court (Cave and A. L. Smith, JJ.) held that these two circulars amounted to a notice of suspension of payment within the section. Cave, J., said it would be "frittering away the language of the section" to hold otherwise, while A. L. Smith, J., confessed that if it were not for the cases of *In re Friedlander* and *In re Walsh* he should have thought the point unarguable.

This case was followed by *In re Lamb, Ex parte Gibson and Bolland* ([1886], 55 L. T. 817), a somewhat similar case, though it was not quite so clear, where the effect of the circular issued on behalf of the debtor was, "I offer you five shillings in the pound; you will get no more because I have no other property and am going out of business," and a divisional Court of the same two judges held it to be an act of bankruptcy. The case went to the Court of Appeal (Esher, M.R., and Bowen and Fry, L.JJ.) who affirmed the decision (4 Morrell, 25). Lord Esher said that the case of *In re Friedlander, Ex parte Oastler*, seemed to him to cause considerable difficulty, and confessed that the distinctions taken in it were too refined for him. "I never can enter into these refinements," he said. "The first thing we have to decide," said Lord Justice Bowen, "is what the statute means." "Suspension of payment is a business term usually applied to traders. . . . It seems to me that it means not meeting your engagements and paying your debts in the ordinary course of business as they become due, and as you are called upon to pay them," and went on to point out that the true test to apply was "what is the reasonable construction which those who receive this statement of the debtor would have a right under the circumstances of the debtor's case to assume, and would assume, to be his

meaning, as to what he intends to do with respect to paying or suspending payment of his debts," and that the cases cited were really all decisions on facts.

*In re Wolstenholme* and *In re Lamb* seemed to put things on the right lines, but a set back came in *In re Fleming, Ex parte the Trustee* ([1888], 60 L. T. 154). In that case the debtors' solicitors issued to their creditors the following circular marked "Private":—

"We have been consulted by Messrs. ——— of this town, whose affairs have become embarrassed, and we have advised them before taking further action to confer with their creditors as to their position. We have therefore to request your attendance at a meeting to be held here on Monday next, the 19th inst., at 11 a.m., when a statement of affairs will be submitted."

The Divisional Court (Coleridge, C.J., and Cave, J.) held that this was not an act of bankruptcy. The judgment was delivered by Cave, J., who relied on the same points as those taken in *In re Friedlander*, that the mere fact that a debtor calls his creditors together with a view to submit an arrangement could not have been meant to be an act of bankruptcy, because that would render par. (f) of sect. 4 (1) of the Bankruptcy Act, which requires a declaration of inability to pay to be filed in Court, nugatory; and he went on to draw a distinction between a notice of a temporary suspension for the purpose of consulting creditors, and a suspension intended to be permanent. It is noticeable that the decision of the Court of Appeal in *In re Lamb* was not cited, and the Court was evidently unaware of it.

These cases left the matter in a very obscure state, but it got clearer again after the case of *Crook v. Morley* ([1891], A. C. 316) went to the House of Lords. There the debtor issued the following circular:—

"Being unable to meet my engagements as they fall due, I invite your attendance at the Guildhall Tavern, Gresham Street, City, on Wednesday next, at 3 p.m., when I will submit a statement of my position for your consideration and decision."

The House of Lords unanimously held that this was an

act of bankruptcy. Lord Selborne said (p. 321) that the test proposed by Lord Justice Bowen in *Lamb's Case* was the true one, expressed the same view about *In re Friedlander* as Lord Esher had done, and dissented from the distinctions drawn in it, and pointed out that *In re Walsh* was decided on its authority, and dissented also from what Cave, J., had said in *In re Fleming*. Lord Watson likewise (p. 324) dissented from the reasoning which found acceptance in the *Friedlander* and *Fleming Cases*, and concurred in all Lord Selborne's reasons. The other two law lords (Macnaghten and Morris) simply concurred. This case put the seal of the highest judicial authority in the country on what certainly appears the sensible construction of the statute.

The next case *In re Entwisle* ([1891], 65 L. T. 349), is here passed over as being no longer important. It came between the decision in *Crook v. Morley* of the Court of Appeal (who differed) and that of the House of Lords in the same case, and is covered by the latter decision.

The next case on the enactment, *In re Daintrey, Ex parte Holt* (L. R. [1893], 2 Q. B. 116), turned on a different point, namely, whether, assuming that the notice given by the debtor is a notice of suspension within the section, it can be used if marked "without prejudice," and the Divisional Court held that it could. This was very shortly afterwards followed by the case of *In re Simonson, Ex parte Ball* (L. R. [1894], 1 Q. B. 433), where the debtors sent out a circular to their creditors in which they said, "We regret to inform you that the recent fall in the ivory market, and other matters, have placed us in financial difficulties which make it desirable for us to consult with our creditors as to our position." Mr. Justice Vaughan Williams held that this came within the rule laid down in *Crook v. Morley*, and was an act of bankruptcy.

In the next case, *In re Scott, Ex parte Scott* (L. R. [1896],

1 Q. B. 619), the question arose out of a conversation between the debtor and one of her creditors, at which she had said in answer to a request for payment, "No, I won't pay anybody now." The Divisional Court (Vaughan Williams and Kennedy, JJ.) held that this was not an act of bankruptcy; and Vaughan Williams, J., in giving judgment said, "I am convinced that sect. 4 (1) (h) is meant to apply to the case of a debtor dealing with his creditors as a body. If a debtor gives notice to one of his creditors that he cannot pay, and that he will deal with all his creditors as a body, that will amount to a notice of suspension of payment; but the notice will not come within the section unless the debtor is dealing with his creditors as a body."

The next case was that of *Trustee of Lord Hill v. Rowlands* (L. R. [1896], 2 Q. B. 124), where Lord Hill's solicitor, in the course of a correspondence between him and Messrs. Hulberts and Hussey, who were solicitors for certain of Lord Hill's creditors, had written a letter in which he said, "As promised we send you herewith statement showing the income and expenditure and the amount of the mortgages on the estates. We think it well to repeat what we stated to you at our interview, that a receiving order will be applied for immediately execution is issued." The same judge held that this was not an act of bankruptcy. "I agree," he said, "that if the letter did mean to intimate that unless the recipients accepted the offer or suggestion in the letter the debtor would have no alternative but to suspend payment, that would be an act of bankruptcy within the meaning of this clause (h). But it does not seem to me to say anything of the sort . . . it does not say, and I cannot understand how, it can be suggested that it says, that there will be a suspension of payment if the offer suggested by the letter and the accompanying statement of accounts that the trustees should accept a second mortgage was refused. It does not say that in that case Lord



Hill is going to suspend payment; *and if you go on and read the further correspondence it is perfectly plain that Messrs. Hulberts and Hussey did not so understand it* . . . .

The next case was of a not dissimilar character. It is *In re Phillips, Ex parte Thomas* ([1897], 76 L. T. 531). The debtor, in the course of conversation with the petitioning creditor, had said to him, "If you do not continue to supply me with bricks I shall not be able to carry out my contracts, and shall have to stop payment." The Divisional Court (Vaughan Williams and Wright, JJ.) held that this was not an act of bankruptcy. The facts of the case are not very fully reported, but it appears, from the judgment of Vaughan Williams, J., that it was admitted that the debtor, at the time he spoke the words, did not intend to suspend payment, and that he believed that the state of his affairs was such that there would be no necessity for him to suspend payment. "He did not," the judgment proceeds, "express his intention to suspend payment. What he did was to express a fear that if something was not done by a particular creditor he might be obliged to suspend payment." In answer to the argument based on *In re Lamb and Crook v. Morley*, that it was the effect on the minds of the hearers, and not the words themselves, that constituted the act of bankruptcy, the learned judge expressed his dissent, saying that "there is nothing in those cases which touches a statement of the character such as that sought in this case to be held an act of bankruptcy." Though the judgment, as reported, is not quite easy to understand, and one is disposed to suspect that the report is not very good, there is nothing to object to so far. Unfortunately, however, the head note to the case goes a little further. It is as follows: "Words which in themselves do not amount to a notice of intention of suspension of payment, cannot by reason of their effect on the mind of the person to whom they are addressed constitute such a notice so as to create

an act of bankruptcy." It seems very difficult to reconcile this with the decisions in *In re Lamb* and *Crook v. Morley*. In the last case the words did not in themselves amount to a notice of intention of suspension of payment, if by that is meant the use by the debtor of the words, "suspend payment"; yet it was held that, since the debtor's words would naturally induce his creditors to believe that he intended to suspend payment, the notice was an act of bankruptcy. Of course, if there is any conflict between the cases, *In re Phillips* must be wrong and *In re Lamb* and *Crook v. Morley* right, as these are decisions of the Court of Appeal and of the House of Lords respectively, but it is submitted that there is not any real conflict; the head note to *In re Phillips* does not properly represent the effect of the decision. On reference to the judgment of Lord Justice Bowen in *In re Lamb*, which was approved in *Crook v. Morley*, it will be seen that he states the test to be, "What is the *reasonable* construction which those who receive this statement of the debtor *would have a right, under the circumstances of the debtor's case*, to assume, and would assume, to be his meaning." Tried by this test, the words used by the debtor in *In re Phillips* clearly ought not to be treated as a notice of intention to suspend payment, since it was not reasonable, in the circumstances of the debtor's case, for his creditor to assume that he meant them to be such a notice.

The effect of the decision, then, seems to be that where the creditor has taken the debtor's words to be a notice of suspension of payment, the construction put on the debtor's words by him must be a reasonable one, one of which they are fairly capable, otherwise it will be disregarded. This is quite in accordance with *In re Lamb* and *Crook v. Morley*. Besides this, there is another reason for not treating the words of the debtor in *In re Phillips* as an act of bankruptcy: it will be seen that the notice was conditional, and it may be that an unconditional, unqualified notice only will

do. Lord Justice Fry said so, in giving his dissenting judgment in the Court of Appeal in *Crook v. Morley* (L.R. [1890], 24 Q. B. D. 320), and though his judgment was over-ruled, no objection was taken to this dictum.

\* The most recent case on the subject is that of *In re Reis, Ex parte Clough* ([1904], 73 L. J., Ch. 929). In this case the debtor had engaged in heavy speculations on the Stock Exchange, and, having got into monetary difficulties, on May 26th 1903, his solicitor saw two of the largest Stock Exchange creditors, and by the debtor's authority informed them that he would have difficulty in meeting his liabilities on pay day, which was May 29th, and that they were at liberty, if they thought fit, to close his accounts. They agreed to avail themselves of this permission; but one of them said that if there were any other Stock Exchange creditors they ought to have the same liberty; and this suggestion was carried out, a like permission being given to the other Stock Exchange creditors. There were, however, yet other creditors of the debtor, besides his Stock Exchange creditors, to whom no reference was made and no communication given. Mr. Justice Wright held this to be an act of bankruptcy; but the Court of Appeal (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.) over-ruled him. Lord Justice Cozens-Hardy said, referring to sect. 4 (1) (h) of the Bankruptcy Act, "the meaning of that sub-section has been fully explained by Lord Justice Vaughan Williams in two cases—*In re Scott, Ex parte Scott*, and *Hill's Trustee v. Rowlands*. The result of the authorities is, that a statement by a debtor that he is unable to pay his debts in full is not by itself an act of bankruptcy, although it may be such if it amounts to a statement that he intends to deal with his creditors in a body. The transaction of May 26th does not, in my opinion, fall within this category." Lord Justice Stirling, after referring to what was said by Lords Selborne and Watson in *Crook v. Morley*, said, "The result is, that in

each case all the circumstances must be looked at; and we have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his debts—that is to say, to abstain from paying his debts as they fall due, at least for a time,” and went on to say that in the circumstances of that case he was unable to agree that the debtor did give notice to any of his creditors that he had suspended or was about to suspend payment of his debts. It is to be observed that both Lord Justices Stirling and Vaughan Williams were careful to point out that they were only differing from Mr. Justice Wright on the conclusion of fact, which confirms what Lord Justice Bowen said in *In re Lamb*, that the question is really one of fact in all cases.

We may now endeavour to sum up the result of what has been said in the foregoing cases.

First, it seems clear that in order for a notice to amount to a notice of suspension within the Act, it need not be formal or deliberate, as the Court of Appeal seemed to think was necessary in *In re Friedlander*. An informal notice is sufficient. *Ex parte Nickoll* and *Crook v. Morley* both seem to support this.

Secondly, the notice need not be in writing; it is sufficient if verbal. *Ex parte Nickoll*, Lord Justice Cotton’s dictum in *In re Friedlander*, and Lord Alverstone’s in *In re Miller* (L. R. [1901], 1 K. B., at p. 57), are direct authorities here, and it is tacitly assumed in several other cases, of which *In re Reis* may be cited as an example.

Thirdly, the test to be applied in order to determine whether any given notice is a notice of suspension of payment or not is: “What is the reasonable construction which those who receive this statement of the debtor would have a right under the circumstances of the debtor’s case to assume; and would assume, to be his meaning?” *In re Lamb*; *Crook v. Morley*. That the construction must be

reasonable is emphasized by *In re Phillips*, and that the creditor must actually have construed the words as a notice of suspension is emphasized by *Hill's Trustee v. Rowlands*.

Fourthly, the notice must evidence an intention on the part of the debtor to deal with his creditors as a body. *In re Scott*; *In re Reis*.

Fifthly, if the notice is otherwise sufficient, it will not be incapable of being treated as an act of bankruptcy merely because it is contained in a writing marked "without prejudice." *In re Daintrey*.

Sixthly, whether the notice is within the Act or not is a question of fact in every case. *In re Lamb*; *In re Reis*.

Finally, it may be said that, though the decision in *In re Friedlander* may be correct, the reasons given for it were almost certainly wrong, while in *In re Walsh* and *In re Fleming* both decision and reasoning were wrong.

WALTER G. HART.

### III.—SUGGESTED IMPROVEMENTS IN THE CONVEYANCING ACT 1881.

**A** CONTEMPLATION of the mass of Conveyancing Statutes that has become law between 1833 and the present time may well lead one to hesitate to suggest the passing of a further measure on the same subject. The inconvenience of crowding the Statute Book must, however, yield to any consideration tending to prevent injustice. The object of this paper is to point out what are believed to be some defects in substance in the Conveyancing Act of 1881, not unlikely to cause serious injury to innocent holders of titles.

It is proposed to discuss Sect. 14 (Forfeiture of Leases), Sect. 17 (Consolidation of Mortgages), Sect. 18 (Leasing

Powers in Mortgages), and Sect. 19 (Appointments of Receivers).

By sub-sect. 6 of sect. 14 the right given to lessees to apply to the Court for relief against a forfeiture is not to extend to the case of a forfeiture for breach of a covenant against assigning or a forfeiture on bankruptcy. It is difficult to see why the Court should not have a discretion to grant relief in the first-mentioned case. Every practitioner knows the great injustice that occurred in *Barrow v. Isaacs*,<sup>1</sup> in which the assignment was made to a perfectly respectable and responsible person, and the lessor had sustained no damage. Owing to the existence of the sub-section in question the Court of Appeal—though evidently anxious to do so—was unable to grant any relief. The statutory remedy did not apply, and there was no equity behind the statute to meet a case of pure forgetfulness to apply to the lessor for the consent.

There may be reasons known at Home why the Act should not be amended, but to one writing from so far away as New Zealand it seems incredible that the Legislature should permit the possibility of future injustice of the same kind.

Another wrong occasioned by the same sub-section is recorded in *Fryer v. Ewart*,<sup>2</sup> where the House of Lords had to refuse relief from a forfeiture for the "bankruptcy" of the lessee, a perfectly solvent company that had gone into voluntary liquidation for the purpose of reconstruction. As already shown, sub-sect. 6 excludes the jurisdiction of the Court in cases of "bankruptcy"—defined in sect. 2 as including any act or proceeding having effects or results similar to those of bankruptcy.

"Definitions," says Sir Courtenay Ilbert, "are dangerous, "and should be sparingly used."<sup>3</sup> "It is a merit," said the late Mr. Charles Davidson, "in this Act (the Real Property

<sup>1</sup> (L. R. [1891], 1 Q. B. 417.)

<sup>2</sup> (L. R. [1902], A. C. 187.)

<sup>3</sup> *Legislative Methods and Forms*, p. 247.

"Act 1845) that it contains no definitions extending the "meaning of words beyond their ordinary acceptance."<sup>1</sup>

It is charitable to believe that the Legislature did not contemplate the necessary result of the language it used.

A partial relief from forfeiture on bankruptcy or execution is afforded by the amending Act of 1892,<sup>2</sup> but the exceptions in which relief may not be granted are so numerous as to all but eat up the rule.

Next in order comes sect. 17, restricting the doctrine concerning the consolidation of mortgages. The section, however, preserves consolidation where the effect of the section is negated in the mortgage deeds, "or one of them." Unfortunately the "one" may not be the deed subject to which the purchase has been made. It is suggested that future mortgagees should not be permitted to contract themselves out of the operation of the section.

The right of a mortgagor to redeem the security ought to-day to be considered as absolute and unconditional as any right conferred by the Common or Statute law. A mortgagee desiring the joint security of two estates should take a mortgage over each of them for the amount of the two loans. There is, it is submitted, no reason for the continued existence of the rule that "the whole doctrine of consolidation . . . arises from the power of the Court of Equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor."<sup>3</sup>

So long as the operation of the doctrine was limited to the case of the immediate mortgagor and mortgagee, no harm was done, but now no purchaser or mortgagee of an equity of redemption is safe, for "by means of so-called

<sup>1</sup> *Concise Precedents in Conveyancing*, "Observations on the Act 8 & 9 Vict., Cap. 106."

<sup>2</sup> Section 2, sub-sects. 2 and 3.

<sup>3</sup> *Cummins v. Fletcher*. (L. R. [1880.], 14 Ch. D., per James, L.J., at p. 708.)

“logical deductions the original doctrine of consolidation became so extended as to cause an intolerable grievance to persons dealing with estates in mortgage.”<sup>1</sup>

“It is a very dangerous thing,” said Wood, V.-C., “at any time to buy equities of redemption or to deal with them at all.”<sup>2</sup>

Is there, it may be asked, any valid reason why a landowner, who has occasion to raise a sum of money on the security of his holding, should find his property unsaleable, and also not a fit security for a further loan well within the margin afforded by the selling value of the land? Is this a fit law to be found among a commercial people?

Attention may here be called to a singular anomaly with respect to the operation of this doctrine. Under the Torrens Land Transfer system the mortgagee obtains only a charge upon the land. As, therefore, the mortgagor has not to go into Equity to redeem, the very foundation of the doctrine fails as regards large quantities of land in the Australasian colonies. In other words, the doctrine applies or does not apply according to the accident of the system of title.

Sect. 18, giving leasing powers to mortgagors, may be negatived “by the mortgagor and mortgagee in the mortgage deed or otherwise in writing.”<sup>3</sup> Inspection of the mortgage deed, therefore, will afford no guarantee to an intending lessee. Some scrap of paper may be in existence, the production of which would invalidate his lease.

The suggestion is that the words “or otherwise in writing” be repealed.

Lastly, fault may be found with section 19 for implying the receivership clauses in every mortgage, irrespective of the amount of the loan or the nature of the security. Probably before the Act of 1881, provision for the appoint-

<sup>1</sup> *Fisher on Mortgages*. 1897. 5th Ed., p. 578.

<sup>2</sup> *Beevor v. Luck*. (L. R. [1867], 4 Eq., at p. 549.)

<sup>3</sup> Sub-sect. 13.



ment of a receiver was made in only one out of (say) three hundred mortgages. The rule was that "where there is reason to anticipate that resort to the income of the mortgaged property may be necessary in order to insure the regular payment of interest, a receiver may be appointed contemporaneously with the completion of the mortgage."<sup>1</sup> As under the receivership clauses the mortgagee gains the advantages, without incurring the responsibilities, of possession (the receiver being deemed the agent of the mortgagor), the mortgagee has it in his power to gratuitously put the mortgagor to unnecessary expense and perhaps to additional loss.

It is suggested that the statutory clauses should apply only where either the sum secured is not less than (say) £3,000, or the parties have, by apt words, incorporated them into the mortgage deed.

It will be observed that the above proposals are in the direction of relieving lessees and mortgagors, parties who in our democratic colonies are perhaps regarded with more favour than in London. And it may be claimed that the adoption of these suggestions would remove some pitfalls from the path of the practitioner.

T. F. MARTIN.

#### IV.—MUSICAL INSTRUMENTS AND THE COPYRIGHT LAW OF ITALY.

THE question whether the reproduction by mechanical means (aristas, pianistas, erophones, phonographs, gramophones) of musical compositions, constitutes an infringement of copyright according to Italian law, has not been dealt with at length by writers on legal matters, chiefly

<sup>1</sup> *Code on Mortgages*. 1904. 7th Ed., 934. See also Davidson's *Precedents in Conveyancing*. 1881. 4th Ed., Vol. II, Part II, pp. 101, 102.

because of the fact that, but for a few unimportant instances, the subject has not engaged the attention of the Italian law courts, and has therefore been considered devoid of practical interest.

There is now reason to believe, however, that the Italian Society of Authors (*Società Italiana degli Autori*) intends to take action in the matter on behalf of the composers and publishers who have placed the conservation of their interests in the hands of the Society. The Society, which is a corporate body recognised by law (Royal Decree, 21 Feb. 1901) is thus enabled to act as the assignee of the authors and holders of copyright. In view of these developments it will not be without interest to examine the legal antecedents of the case.

In 1894 at Potenza, during a musical entertainment, a phonograph played pieces from the *Forza del Destino*, *Amico Fritz*, *Pagliacci*, and other operas. The audience was charged 15 c. a head for each piece. The representative of the Society intervened on behalf of the composers, and claimed a percentage on the receipts. The official on duty resented the intrusion and declared the request to be illegal, and the matter was ultimately carried before the local police court (*Pretura*). The Pretore held that no breach of the Copyright law had been committed. No appeal appears to have been put in against this judgment; but the Society of Authors determined to take counsel's opinion on the case. In a short paper, published in the Society's Bulletin for November 1894, Avv. Rosmini argued that in his opinion the unauthorised reproduction by means of the phonograph of musical and other compositions constituted a breach of copyright, according to Articles 3, 32, 34<sup>o</sup> of the Law of Sept. 19th, 1882.

This conclusion cannot be accepted otherwise than as the expression of a perfectly legitimate desire, in which every enlightened mind will concur, and which has been

frequently voiced in recent Congresses by authoritative representatives of different countries. Most people agree that the interests of authors and composers need a larger amount of protection than has been afforded to them. They are seriously threatened by the free reproduction of their works by new mechanical processes, unknown at the time the Copyright laws were framed. The so-called talking machines have reached a considerable degree of perfection. Huge sums are constantly paid to artists for records of pieces taken from popular operas. Large profits are reaped by manufacturers and dealers. The composer has an obvious right to be considered, and to receive a share of the profits.

But the question is not, whether a composer has an abstract right of prohibiting unauthorised reproductions of his works, but whether the positive laws of the country afford him sufficient support in enforcing his claim. And on this point we may be allowed to differ from the opinion propounded by Avv. Rosmini. The principal reasons in support of our contention are based on Article 3 of the *Protocol de Clôture* of the Berne Convention of 1882, and on the opinion expressed by Scialoja in 1865, when the Italo-Swiss Treaty was being framed. In order to correctly estimate these precedents it is necessary to go back to their origin.

France was the first country to declare in favour of mechanical reproductions of this kind. Treaties of commerce and for the protection of Copyright were being elaborated between France and Switzerland. The latter, who possesses amongst her most flourishing industries the production of musical boxes and barrel organs, stipulated that the sale of these goods should be declared free, a condition which was accepted by France in consideration of other concessions of a reciprocal nature. The result of these understandings was the Law of the 16th May, 1866, which contains a single paragraph to the following effect :

"The manufacture and sale of instruments destined to reproduce by mechanical means musical airs protected by copyright, shall not be construed as constituting the offence of musical counterfeit contemplated and punishable according to the Law of the 13th July 1793 and Article 425 and subsequent articles of the Penal Code."

The same point was raised by the Federal Government in the course of the preliminary discussions for the Convention with Italy, and the Italian Government, fearing lest the acceptance of this condition should be contrary to the new Copyright law that had just been passed, commissioned the eminent juriconsult Scialoja, to whose initiative the Law of the 25th June, 1865, was largely due, to report on the matter. And Scialoja, in his letter of the 23rd October, 1865, stated that "these musical boxes were instruments, that is, mechanical appliances, by which one or more pieces of music could be played, *but they could not be considered reproductions of the musical compositions*, either as writing or music, or as a theatrical and spectacular representation of a musical work."

Such is the origin of Article 4 of the Italian-Swiss Convention of the 5th May, 1869:

"The stipulations of Art. 1 (Protection of copyright matters) apply to the execution and representation of dramatic and musical compositions published, executed or represented for the first time in Switzerland after the present convention shall have entered into force; on the contrary they do not apply to the reproduction of musical airs by means of musical boxes or similar instruments, which means that no restriction or reserve, based on the present convention or on a special law, can be laid, in either country, on the manufacture and sale of these instruments."

After these explicit declarations it was only natural that France and Italy should give their approval to the *Protocol de Clôture* of the International Congress of Berne of 1882. Article 3 was accordingly framed as follows:

"Il est entendu que la fabrication et la vente des instruments servants à reproduire mécaniquement des airs de musique empruntés au domaine privé ne sont pas considérés comme constituant le fait de contrefaçon musicale."

The Convention was declared to form part of the law of the country by royal rescript the 6th Nov. 1887.

It is impossible, in the face of such evidence, to maintain that the manufacture and sale of talking-machines and records fall under the sanction of the Copyright laws of Italy. Rosmini quotes the provisions of Articles 1 and 3, 32 and 34, of the Berne Convention. But these articles are couched in general terms, and we have already seen that Article 3 of the *Protocol de Clôture*, which forms part of the Convention, expressly provides an exceptional treatment in favour of these instruments. Rosmini tries to weaken the significance of Article 3 by reporting the words of Numa Droz, the eminent Swiss statesman, who played a prominent part in the framing of the Berne Convention and in the subsequent work of addition and revision. During the Congress held in Berne in the year 1889, Droz is said to have observed :

“ En 1885 on a réservé la question au point de vue des orgues de Barbérie et des boîtes à musique, mais depuis lors, par suite des progrès de la mécanique, on a fabriqué des appareils qui réalisent des véritables atteintes au droit d'auteur.”

And on another occasion :—

“ Il s'agit d'interpréter l'art. 3 ainsi que l'a fait avec beaucoup de prudence la Cour Suprême de Leipzig de telle manière que cet article ne soit pas étendu inconsidérément à tout les instruments reproduisant des airs de musique.”

The comments of Droz, framed in the light of subsequent events, do not detract from the real value and significance of the article. It is the opinion of a statesman highly competent to judge, but nevertheless an opinion given in a private capacity, and it cannot be raised to the dignity of an official interpretation or corollary of the Berne Convention, to which position Avv. Rosmini tends to exalt it.

The letter and the spirit of Article 3 cannot be constrained in the direction affected by Droz, and as for the judgments of the German Imperial Courts, which he holds up to public admiration, they do not strike one as remarkable for the soundness of their arguments. Their value is considerably marred by the laboured effort, painfully apparent throughout, of running counter to the French

jurisprudence, on which the defendants based their case. The contradiction raised by these judgments with regard to the Berne Convention eventually produced the law of 1901, under whose liberal provisions musical instruments and talking-machines are allowed to flourish undisturbed throughout the German Empire.

The range and significance of Article 3 of the *Protocôl de Clôture* has been recognised by the most eminent authorities on Copyright law. It is generally considered to form an insurmountable barrier against the composer's claim of copyright on all mechanical reproductions of their works.

The Congress of Vevey (August, 1901) voted the suppression of the Article. The Congress of Leipsic (June, 1901), dealing with the case from the point of view of the publishers, arrived at the same conclusion. At the recent Congress of Naples, the delegate M. Osterrieth, after an elaborate historical summary of the question, expressed the opinion that a solution could only be found in an international agreement. M. Ferrari—himself a member of the Society of Authors—held that to his mind the matter should be first dealt with by the internal legislation of each country, and pronounced that Italy was ripe for a reform in this direction. In other words, the weightiest testimony favours the opinion that Italian Copyright law, in its present condition, is inefficient to protect the interests of authors and composers in the matter of reproductions of their works by mechanical processes, and we feel quite justified in assuming that, under the circumstances, no legal action directed to prohibit the free manufacture and sale of talking-machine records could be successfully maintained before an Italian law court.

Any preventive measure on the part of the composers or on that of the Society of Authors would have, of necessity, to assume the shape of a parliamentary initiative directed to obtain a reform of the Copyright law.

H. ST. JOHN-MILDMAY.

## V.—THE DEAD HAND.

IT is somewhat strange that the absolute freedom of bequest, which the people of England and Ireland enjoy, has been so long allowed to continue without hostile criticism. It is of comparatively modern growth, and as will be seen presently, its very existence in England is not quite so perfectly certain as is generally supposed. The testamentary power everywhere is entirely the creation of written law, and the written law of most, if not all other countries of the civilised world, while it almost universally gives the power, almost universally accompanies it with restrictions. It is proposed, in the present article, to direct attention to the desirability of somewhat curbing our freedom also, and to illustrate the argument by a few salient instances of the particular use or abuse of this great secret force, which he who exercises it can never himself witness the effect of.

The will of the late Mr. Rhodes is fresh in everybody's memory, and all which need be said about it here is (1) that his property was acquired and not inherited, (2) that he was unmarried, and (3) that he combined a sensible treatment of his relatives with careful and comprehensive provisions for the public. Nor did the late Leeds merchant, whose case will be referred to more in detail presently, forget his cousins in a will extensively providing with many hundreds of thousands for the spiritual illumination of the whole unilluminated world. The same was the case with the founder of Guy's hospital. But only a short time ago a rich banker bequeathed a shilling apiece to each person establishing relationship to him, and a residue of many thousands for distribution among charitable institutions. This "cutting off with a shilling" was more common in earlier days than now. Witness the *Times* Obituary of the

5th January, 1802, reprinted in the corresponding number of that journal for January, 1902 :—

At Camberwell, in the 90th year of his age, Mr. Earle, woollen draper and tailor, grandfather to the celebrated Miss Robertson, now a prisoner in the Fleet, and to whom by a former will, he had given 10,000 but has now left her only one shilling.

The “celebrated Miss Robertson” may have deserved her fate, and so may any shilling legatee; but in all these cases to be silent is better than to brand the offender with implied reproach.

Out-of-the-way bequests are, however, in themselves often innocuous. Thus, quite recently, an eccentric Frenchman left a large fortune to his native town of Rouen, to be expended in creating and maintaining a race of giants by a succession of giant marriages. This naturally led to litigation, with the result that Rouen has felt the burden of the giants much less than the testator intended. An even more eccentric Frenchwoman devoted her little all to the establishment of communication between this earth and the planet Mars. More reprehensible are the restraints of marriage, as where a father pushes to the utmost his legal power of restriction, to the extent, for instance, of prohibiting marriage with a Papist, a Christian, or even a Scotsman. But worst of all is the case of the clergyman of the Church of England who left behind him a widow and children and a considerable fortune, which he wholly bequeathed to a religious society—the managers of which, it is pleasing to state, contrived to see their way to making a large and substantial restitution to the grossly injured family. The case aroused great indignation at the time, and a correspondent of *Truth*, which had vigorously attacked the unique injustice of English law, took occasion to call the attention of that journal to a certain unrepealed clause of Magna Charta, by which the widow and children are entitled to their “reasonable parts” of the goods of the father of the



family, notwithstanding his will, with the result that one-third goes to the widow, one-third to the children, and only the remaining third to the legatees.

The Editorial comment<sup>1</sup> was—

If I understand the author of the above letter aright—and I have every respect for his authority—it is open to question whether this power—to dispose at pleasure of a personal estate—covers more than one-third part of the estate in respect of which a disposing power was given by Magna Charta. It is strange that no one has ever tested this point, but I suppose the truth is that cases in which testators have willed away their whole estate from their wives and children have been very rare. Even in the recent case, however, the widow and children would have been entitled, under the rule laid down in Magna Charta, to nearly double the amount which they actually obtained by the favour of the Bible Society. Anyhow, the fact that a doubt may exist on the point strengthens the case for legislation; and in place of a Government Bill expressly repealing the clause of Magna Charta, what seems to be required is a Bill reaffirming this just and wholesome provision, and limiting accordingly the disposing power given in the Wills Act.

The Government Bill referred to in the above paragraph was a consolidating one, which repealed amongst other enactments that clause of Magna Charta which the much-repealing Wills Act had left unrepealed, and which appears in full force in the Revised Statutes published by authority. Shortly after the introduction of this Bill there appeared in the pages of the *Daily Chronicle* an article headed “Women’s Rights and Magna Charta,” drawing attention to the long-established rights of widows and children which it was proposed to sweep away by a so-called Consolidating Bill. Whether it was a case of *post hoc propter hoc*, I cannot say, but certain it is that the Bill was soon abandoned, never to be re-introduced from that day to this.

The case of an unmarried and childless testator is of course widely different from that of the head of a family, and raises very difficult problems. In Ireland these problems are solved, as readers of *Priests and People in Ireland* will well remember, by wholesale dispositions to superstitious uses and denominational charities. In this country such modes of “Deity-bribing”—the expression is not

mine but that of the Author (an Irish Roman Catholic barrister) of *Priests and People in Ireland*—or Fire Insurance is more rare, and once—but only once—have I heard it denounced from the pulpit. \*Even in Ireland clerical exhortations to prefer the Roman branch of the Catholic Church to one's own family are resented and disregarded now and then, as happened in the case of a certain rich old lady of whom this story is told. Lying on a bed of dangerous illness, she was besought by her father confessor to divert from her relatives and devise to monasterial uses a goodly piece of land hard by her house; nor were there wanting hints, that not so very long before the same piece of land had been diverted from the church by some not very scrupulous member of her family. "No," she said, "I will not do this thing. It is better that an old woman should be howling in Purgatory for ever so many years than that my family should lack land." Besides charities, animals of all kinds (except, I believe, birds) may be preferred by a testator to his widow and children. This follows from the case in which a man's horses and hounds came in for an annuity of £750 a year for fifty years if they should so long live—the will containing a provision that, should it be necessary to shoot any of the legatees prematurely, the deed of death should be dealt "with a double-barrelled gun, both barrels loaded at the same time, with clean barrels and a full charge." The testator in this case was childless, but if he had had a wife and twenty children the legal result would have been the same.

The testamentary power is an enormous concession by society to the individual. To preserve to the living, who can fight for it, the full right of property is one thing, to preserve such a thing to the powerless dead is quite another. Yet in all ages and in all countries "the Dead Hand" has been clothed with more or less force. In England and Ireland, alone in civilised countries, this force is almost

equal to that of the living one. This ought not to be. The law of Scotland ought to be made the law of England and Ireland as to personal property, and the law of dower ought to be restored in the case of unsettled land, as to real property. In the majority of cases, of course, the practice of marriage settlements operates to prevent gross injustice, but marriage settlements are unknown to the poor. As for the unmarried, it is probably best to leave them undisturbed in the existing absolute freedom of bequest, and the Legislature might well encourage the exercise of this freedom by a return to the state of things before 1880, and increasing the estate duty payable on intestacy, on the ground that intestacy is bad for the public by producing confusion.

The infinite variety of circumstances renders it very difficult to lay down many general rules as to the proper mode of exercising the testamentary power. It may be said, however, with certainty, that a great distinction may well be drawn between (1) childless testators and those who have children, and (2) between property acquired and property inherited. The colonial plan of rewarding an executor by a percentage on the estate realised might well be adopted in this country, for, as has been at least once remarked from the Bench, the legacy to executors is far too frequently insufficient. This parsimony may perhaps be the result of ignorance of the law. Until 1830 the executor came in for an undisposed-of residue, and some people may suppose that this is still the case. Another difficulty arises often from miscalculation. Very few people know how much they are worth at any moment. No one of course can possibly know how much he will be worth when his will comes to speak from his death. Some people are so stupid as to think that to make a will must needs accelerate their end; others will put it off or neglect to amend it as new circumstances arise, merely to save present expense; others have so much imagination and so little to employ

their time, that they must be always will-making and wishing to die that they may see how the thing will turn out. Others will show their great love for the lawyers by making their own wills; and, what is even better for the professional interest, in adding would-be simple codicils to the elaborate productions of well-instructed conveyancers. Some will appoint executors without consulting them beforehand. Some will appoint an executor by consent and afterwards, without informing him, appoint someone else. Some will leave their charitable subscriptions unpaid in their lifetime and make up the loss by excessive charitable bequests. A person asked to be executor of an unjust will ought to refuse point blank; but a very different question arises in the case of a solicitor. I am inclined to think that a solicitor ought to refuse to make an unjust will, but the point is a very difficult one, and, so far as I know, absolutely uncovered by any authority.

The subject of charitable bequests has not been sufficiently considered as a whole by moralists, by lawyers, by legislators or testators. The newspapers are apt to term them "munificent," which is of course a misnomer. Yet such is the power of imagination that the testator also will think them munificent in anticipation. They may often be just, as where the testator has been so much the life of a useful charity that its loss of support by his death will cause great and unexpected inconvenience to poor and deserving people. They may often, however, be wasteful, and legislation, which some fourteen years ago took a step in their favour by allowing land to be devised to charities, subject to the condition that the land should be turned into money, might well take some step in the other direction. For instance, we might well double the present ten per cent. duty, or at least double it in the case of those charities whose accounts are not duly audited and published. The late Mr. Gladstone, in a Budget speech, once announced his

view that people "should leave their money to their descendants and not in a fanciful way to be glorified after their death;" but his efforts at the height of his popularity to make charitable institutions pay the expenses of the Charity Commission, were utterly routed by the Charity interest, and any scheme for the proper regulation of posthumous beneficence might perhaps be defeated by similar opposition. Perhaps the worst instance of this beneficence in recent times is that of the merchant, by whose will some £900,000 was directed to be applied—

In giving to every tribe of Mankind which has them not and speaks a language distinct from all others, accurate and faithful copies of at least the Gospels of John and the Gospel of Luke, together with the book of the Acts of the Apostles printed in the language of that tribe, and to teach at least ten persons of each tribe to read the same in all Africa, in South and Central America, in Asia, in the South Sea Islands, and in the Indian Archipelago.

Any posthumous dissemination of opinions such as this ought to be discouraged by law, and the discouragement should extend to opinions of any kind, such as that of the Gifford Bequest, the Jowett Bequest, and lectureships of various kinds. The power over future generations should be exercised by living persons only. To allow any posthumous creation of it is to run too great a risk. Posthumous creation should be reserved for actual benefactions, and the wider the terms of such benefactions the better. A gift towards paying off the National Debt is useful as well as legal, and the same may be said of the benefaction of the late Colonel Petrie, who some sixty years ago bequeathed his many thousands "to the Queen's Chancellor of the Exchequer for the time being to be by him applied for the benefit and advantage of his beloved country, Great Britain." Much better was this wide beneficence than that narrow one of the testatrix who wrote: "As I consider all my family the same to me I wish to make no difference, and as I could not select any of them who I confidently could feel would not spend my money on the vanities of the

world, as a faithful servant of the Lord Jesus Christ, 'I feel I am doing right in returning it in charity to God who gave it; I therefore bequeath all the residue of my personal estate to my brothers on trust to build almshouses with as soon as land shall be given for building them upon.' This pious disposition was set aside for remoteness by the late Lord Romilly, but the Court of Appeal, with better law than policy, allowed it to take effect.

One of the most commendable charitable bequests of recent times is that which is termed the Nobel Prize. Nobel, the great Swedish manufacturer of explosives, a few years ago, bequeathed a huge sum, of which the interest amounts to about £8,000 a year to each prizeman, to various benefactors of their kind of any nationality in the domains of philosophy, discovery, and literature. Professor Mommsen has obtained one of the literary prizes, and Mr. Cremer, M.P., another, for an essay on the best means of ensuring international peace. Candidates are recommended by qualified persons of all nations, and there is every reason to believe that the awards are made by the Swedish Academy with absolute impartiality. The principle has been translated into action often before, but never on so large and cosmopolitan a scale. There is perhaps also something to be said for bequests to individual public benefactors, or supposed public benefactors by name. Such were the legacies of £10,000 to the first Pitt by the great Duchess of Marlborough, and that of £45,000 by Mrs. Brydges Williams to Lord Beaconsfield when plain Mr. Disraeli, and that to the late Miss Cobbe under the will of a complete stranger.

The strong desire of testators to impress their views of right and wrong upon their successors is well illustrated by the two following examples touching the use and abuse of intoxicating liquor and of the precepts concerning it:—

A Hamburg merchant had five sons, all ardent teetotalers. To rescue these misguided young men from the demon of teetotalism, he willed that each of the five should on the day of his funeral drink a glass of wine to his memory in some public place, adding as condition subsequent, that if any of them should refuse to drink the enjoined glass, his share of the inheritance should be forfeited and divided up among his more complaisant brothers, but if all should refuse the whole family property should go to charities. This eccentric disposition furnishes no parallel in the history of the teetotal controversy, or furnishes it alone in the case of the teetotaler who bequeathed a well-stocked wine cellar, which he himself had shortly before acquired by bequest, to a fellow teetotaler, with instructions to pour its contents away untasted into the ground—and poured out into the ground the contents accordingly were.

In conclusion I will give a few instances of the last desires of well-known men:—

Here is what the late Pope said:

In approaching the end of our mortal career we set down our last wishes in the holograph will. Before all we humbly pray, &c. . . . We also implore the intercession, &c. . . . In disposing of the family patrimony which belongs to us we appoint as our heir our nephew Cardinal Pecci. . . . In this Will we have not made provision for our nephew Camillo or our nieces Anna and Nina, having on the occasion of their marriages made suitable provision for their maintenance during our life. We declare that no member of our family can make any claim not granted in this document, for all the rest of our property has come to us through the investiture of the Pontificate and consequently is and in any case we wish it to be, the absolute property of the Holy See.

Here is one of the legacies of Napoleon:

10,000 francs to the sub-officer Cantillon, who has undergone a prosecution, being accused of a desire to assassinate Lord Wellington, of which he has been declared innocent. Cantillon had as much right to assassinate that oligarch as the latter had to send me to perish on the rock of St. Helena.

The long and complex dispositions of the late Mr. Herbert Spencer (whose will was made in January, 1900), contain the following:—

If and when, within ten years after my death, a Bill shall be introduced into Parliament for the compulsory adoption of the metric system of weights and measures, I desire that my pamphlet, entitled "Against the Metric System," shall be reprinted from the stereotyped plates which were cast in February, 1901, and are now in the custody of Messrs. Harrison and Sons, with such corrections as are indicated in a copy of the pamphlet which I have deposited in my safe, and, that such reprinted pamphlet shall be distributed gratis, and at the expense of my estate, among members of both Houses of Parliament, and shall be put on sale by my publishers at a nominal price. . . .

And I declare that my trustees shall apply as nearly as possible the *whole of the income derived from all investments for the time being representing my residuary estate* and also the income derived by my estate from the publication and sale of the works mentioned in this my Will (including the autobiography and biography) in resuming and continuing during such period as may be needed *for fulfilling my express wishes, but not exceeding the lifetime of all the descendants of Queen Victoria who shall be living at my decease and of the survivors and survivor of them, and for 21 years after the death of such survivor*, the publication of the existing parts of my "Descriptive Sociology" and the compilation and publication of fresh parts thereof upon the plan followed in the parts already published.

When the series of works shall have been completely executed and published, my trustees shall thereupon sell by auction the copyrights, stereotype plates, and stock of the whole body of them, and shall sell in like manner the copyrights, stereotype plates, and stock of such of my works, if any, as continue to be published by them, and shall sell in the usual way the shares, stocks, funds, securities, and other property held by them as trustees, and shall give the sum realised in equal parts to the Geological Society, the Geographical Society, the Linnean Society, the Anthropological Institute, the Zoological Society, the Entomological Society, the Astronomical Society, the Mathematical Society, the Physical Society, the Chemical Society, the Royal Institution, and the British Association, or such of them as shall then be in existence, and the same shall accept the gift upon the condition in each case that the sum received shall, within five years from the date of payment, be spent by the governing body for the purchase or enlargement of premises, or for books or apparatus, or collections, or for furniture or repairs, or for equipment, or for travellers and donations of instruments of research; *but in no way or degree for purposes of endowment.*

Lastly, here is an extract from the will of the first Lord Mansfield, who was Lord Chief Justice of England for more than thirty years. After legacies to friends and dependents and a bequest of the residue to his friend, Lord Stormont, absolutely, this will concludes as follows:—

Those who are dearest and nearest to me best know how to manage and improve, and ultimately in their turn to divide and subdivide the good things of this world which I commit to their care according to events and contingencies which it is impossible for me to foresee or trace through all the mazy labyrinths of time and space.

J. M. LELY.



## VI.—CRIMINAL STATISTICS, 1903.<sup>1</sup>

**F**OLLOWING on the Introduction to the volume of Criminal Statistics for 1902 which was prepared by Sir John Macdonell, and in which was discussed the changes in crime for the decade 1893—1902, the Introduction for 1903 has been confined to a brief summary of the figures presented in the Tables. This summary, however, indicates that in 1903 there was an increase in the more serious forms of crime as compared with 1902, and as one of the conclusions arrived at by Sir John Macdonell was that 1902 also showed a slight increase, we propose, first of all, to examine the grounds for concluding that this increase in crime was taking place, and to draw attention to some of its significance. We propose to consider, then, some of the more interesting and striking features of the figures for 1903, as they appear in the several Tables, with reference also to the corresponding figures for previous years.

The statistics under our notice at present are in many ways far simpler and more accurate than it is possible for many others, for example trade returns, to be; but an attempt to elicit from them a trustworthy answer to the question, "Is crime increasing or decreasing in England?" is beset with many difficulties. Thus the figures, whether relating to the number of persons tried or the number of crimes reported to the police, can afford no certain measure but only a more or less accurate indication of the number of crimes actually committed, for it is obvious that the proportion of crimes not reported at all cannot be ascertained, and will certainly vary with the class of crime and also with changes in law and public opinion. Besides, the proportion of offenders brought to justice for the crimes which are reported will vary with, amongst other things, the efficiency of

<sup>1</sup> *Judicial Statistics, England and Wales, 1903.* Part 1.—Criminal Statistics. London: Eyre & Spottiswoode.

the police. But beyond this, it is important to observe that Tables which are merely numerical, such as those giving the number of crimes reported to the police or the number of persons tried, cannot be expected to serve in themselves as a complete index to the state of the country as regards crime; for they can usually give no indication of the gravity of the individual offences enumerated under one head, such as "burglary," "embezzlement," "assault," whereas, clearly, this consideration is of fundamental importance in the estimation of the country's crime. A daring and successful burglary carried out by a gang of "experts" constitutes a much greater outrage on society, and, while the criminals are at large, society is subject to a much graver menace than is the case when a clumsy thief breaks a shop window and snatches an article of cheap jewellery; yet each crime will appear as a unit in the total of reported burglaries.

It must not be expected, therefore, that any exact measure of the year's crime can be found in the statistics; but we have several indications to guide us to pretty safe conclusions as to whether crime is increasing or diminishing, and as to the classes of crime in which the more important changes are taking place. Chief among these, and of proved reliability, is the index furnished by the number of persons tried—on indictment and summarily—for indictable offences. By confining our attention to indictable offences only, we exclude the enormous number of *contraventions* of bye-laws and regulations, and those trifling offences which are in no sense criminal, which furnish the bulk of the business transacted by the Courts of Summary Jurisdiction; of these we shall have more to say later on. This indication of the prevalence of crime, which is both convenient and of great significance, is often taken alone, but it is probably well to check any conclusions drawn therefrom by reference to the number of crimes reported to the police, for by so doing we tend to eliminate any error which would be introduced, if

the first group of figures were taken alone, by an increase of police efficiency in the detection of the perpetrators of the crimes reported to them.

It is when judged by this combined test that the figures for 1903 must be taken to indicate that from 1900 there was a progressive increase in crime in the country, and that this increase, though more marked in some classes of crime than in others, was very general.

The total number of persons tried for indictable offences in 1903 was 58,444, as against 57,063 in 1902, and 55,453 in 1901, which, as mentioned above, showed an increase on the figure for 1900; the annual average for the period 1899—1903 was 55,018. Of course the population of the country was not stationary throughout this period, but taken relatively to population there was also an increase in the number of persons tried, for whereas, in 1901, 170 persons for each 100,000 of population were tried for an indictable offence, the figure for 1902 was 173, and in 1903 it rose to 175; the annual average for the period 1899—1903 was 168·6. Turning now to the figures relating to the number of crimes reported to the police, we find that their testimony is very similar; for the number of indictable offences reported in 1903 was 86,172, as against 83,260 in 1902, and 80,962 in 1901; the proportion of crimes per 100,000 of population being 258 in 1903, but in 1902 only 252, and 248 in 1901.

We are, therefore, forced to conclude that throughout the period 1900—1903 there was a steady increase in the country's crime; but while this increase is of some significance, and that of a disappointing character, it must not be regarded as of too serious import, for it follows on a period of fairly steady decrease, and can be attributed, at any rate in some measure, to conditions which will no doubt be of temporary duration. In spite of the increase in the last few years, the number of persons tried for indictable offences

was but little higher in 1903 than in 1893, and the figures for 1902 and 1892 were practically identical; the population had, of course, much increased in the 10 years, so that whereas in 1893 the proportion of persons tried per 100,000 of population was 193, in 1903 it was only, as mentioned above, 175. We do not at present attempt to answer the question whether there has been a growth of crime generally as compared with 30 or 40 years ago, but only to show that the decline which was certainly taking place in the decade preceding 1900 has been checked, and a period of increasing crime has commenced. How long this will continue or to what extent it will grow it is impossible to say; we can only hope that the period will be short and the growth but slight.

On examination of the figures in more detail we find that in each of the six classes into which are grouped the 83 indictable offences enumerated in the Tables, there was, in 1903, an increase in the number of persons tried, as compared with 1902. In Class I, Offences against the Person, and Class IV, Malicious Injuries to Property, the increases were, in the aggregate, not very important. In Class V, Forgery and Offences against the Currency, the increase was, as regards the coinage offences, significant though slight, and will be referred to below. The increase in Class II, Offences against Property with Violence, was relatively large, viz., from 2,850 persons tried in 1902 to 3,118 in 1903; and in Class III, Offences against Property without Violence, the numbers were 50,161 in 1902, and 51,009 in 1903 (of whom the great majority, viz., 39,435 and 40,127, were tried for "simple Larceny and minor Larcenies" in the two years respectively). In Class VI, "Other Offences," the increase from 710 in 1902 to 900 in 1903 was due almost entirely to the increases under the heads "Habitual Drunkenness" and "Attempting to Commit Suicide."

The number of persons tried for murder in 1903, namely,

78, was higher than in any year since 1893, and the number tried for attempts to murder was also high, while the figure for manslaughter was considerably lower than usual (153 as against an annual average for the last five years of 180). Of the 78 persons tried for murder 40 were convicted and sentenced to death—a higher number than in any year for which statistics are available, the next greatest being 38 in 1884. Of these 40 persons (35 males, 5 females), sentenced to death, 27 (24 males, 3 females), were executed, and in the case of the 13 others the capital sentence was commuted to penal servitude for life. Of the 78 persons charged with murder 20 were found insane on arraignment (being unfit to plead), or guilty but insane, the remaining 18 were either acquitted or the proceedings against them were dropped.

The figures giving the number of persons tried *on indictment* for the offence of cruelty to children are rather instructive. They show a marked increase in recent years; for the annual average for the period 1894-8 was 47, and for 1899-1901 was 81, while by 1902 the number had risen to 135, and in 1903 still further to 152. The number of persons tried on indictment for this offence is always a very small fraction of the number tried summarily, which for 1903 was 3,623, but the increase just pointed out in the number tried on indictment is made more striking by contrast with the general steadiness in the number tried summarily since 1899, save for a considerable *drop* in 1903. The direction in which is to be sought the reason for this recent increase in the number of persons tried on indictment for cruelty to children is revealed by an examination of the Table giving the result of the proceedings against these persons: for it is observed that, of the 133 persons convicted at Assizes and Quarter Sessions in 1903, no less than 64, or nearly one-half, were committed to an Inebriate Reformatory, and the significance of this fact is increased when we have regard to the smallness of the total number (only 16)

committed by these Courts to Inebriate Reformatories on conviction of other offences, excluding that of habitual drunkenness.

It was by the Inebriates Act of 1898, under which the State Inebriate Reformatories were established, that Courts of Assize and Quarter Sessions were empowered to commit to an Inebriate Reformatory, for a term up to three years, any person convicted before them of any offence punishable by imprisonment or penal servitude if it appears to the Court that the person is an habitual drunkard and that his offence was due to drink, and it seems necessary to suppose that the increase observed since 1899 in the number of persons tried on indictment for cruelty to children, has been due to a recognition on the part of judges and magistrates that many of the worst cases of cruelty to children must be regarded as a consequence of drunken habits, and to a desire to take advantage of the method provided by the Inebriates Act of dealing with such offenders.

It may be remarked in this connection that the Courts still appear to be reluctant to use the powers given them under the Inebriates Act, even in the case of persons convicted of habitual drunkenness. The number of persons committed to Reformatories in 1903 by all Courts, including Courts of Summary Jurisdiction, was only 306; of these persons 226 were convicted of habitual drunkenness only: the total number of committals in 1902 was 279. (Table LII.) In his Report for the year 1903 the Inspector under the Inebriates Act pointed out how slowly and sparingly judicial authorities had taken advantage of the provisions of the Act, and that the Courts of Summary Jurisdiction which showed any activity in the matter were either presided over by a stipendiary magistrate, or had on the bench one or two magistrates who manifested a particular interest in the problem of dealing with drunkenness. It is certainly

extraordinary that from thirteen counties, representing a population of two and a-half million persons, and possessing 160 petty sessional Courts, only some half-dozen persons had been committed to Inebriate Reformatories in the five years during which the Act had been in force.

Probably the failure of certain of the local authorities to make provision for the detention of cases committed from their area has had something to do with the inaction of the magistrates, and possibly there is some reluctance to sentence a person to "three years' punishment just for drunkenness." But the real object of the detention is not punishment but reformation, and reformation is impossible unless the influences brought to bear on the offender have a considerable time in which to operate. Moreover, there are certainly very many habitual drunkards who spend a considerable portion of their life in prison undergoing short terms of imprisonment; for such, at any rate, even if complete reformation be despaired of, it would seem better to order a term of continuous detention in a Reformatory than allow them to remain in intermittent drunkenness and imprisonment.

Turning again to the Table showing the number of persons tried for indictable offences, we next observe that the figures point to a considerable and steady increase in the crimes of burglary and housebreaking, etc., since 1898. The average number of persons tried for these offences annually in the period 1894-8 was 1,762, the number tried in 1901 was 2,115, it rose again in 1902 to 2,550, and then in 1903 there was a further increase of nearly 12 per cent. to 2,853. The indication furnished by these figures is borne out by the Police Returns, from which it appears that whereas in 1901 the number of such crimes reported to the police was 8,482, in 1902 it was 8,791, and in 1903 rose again by nearly 10 per cent. to 9,659. An increase of this kind cannot be wholly accounted for as natural in

view of the increase of population, which was less than 2 per cent. from 1902-3, but part of it is no doubt due to the change in the law introduced by the Summary Jurisdiction Act of 1899, whereby the age up to which persons charged with burglary and housebreaking can be tried summarily was raised from 12 to 16, for this change has certainly operated to increase the number of children charged with these offences, in proportion to the number of crimes committed by them: there is good reason to suppose that prior to 1899 many offences similar to those now returned as burglary and housebreaking were dealt with summarily as simple larcenies, when committed by juvenile offenders. But although these considerations tend to show that a part of the increase is more apparent than real, we are forced to conclude that in 1903 there was an actual increase in this class of crime, and probably a smaller increase in the two or three preceding years.

The number of persons tried for the offences included in Class III—Offences against Property without Violence, including Larcenies of various kinds—is always large; indeed, it is important to remember how large a proportion of the indictable offences committed are larcenies. In 1903, of the 58,444 persons tried for indictable offences, 40,127 were tried for simple larceny or minor larcenies, and 6,190 for larceny from the person, larceny by a servant, and other larcenies for which separate returns are made.

By far the most striking change in the figures for these offences in recent years is that which has taken place in the number of persons tried for the crime of larceny from the person. We find that whereas the number tried for other larcenies sank from 43,793 in 1893 to 37,989 in 1899, and then rose steadily till 1903 when it was 43,847, its previous level being then reached and passed, in the same period the number tried for larceny from the person sank uninterruptedly (save for a slight check in 1897) from 3,993 in 1893



to 2,470 in 1903, and in the last two or three years, when other larcenies were increasing so rapidly, the decrease in larcenies from the person went on if anything faster than ever. That this change is significant of a real decrease in the crime seems to be proved by the figures for the number of cases reported to the police. Here again we find indicated a decline in "other larcenies," from 1893 to 1899, with a rapid rise thereafter till 1903 (though the number reported in that year fell considerably short of the number for 1893, showing that the proportion of persons tried, to crimes of this class known to the police, had increased perceptibly in the decade), while there was a steady fall in the number of larcenies from the person reported, which was very similar to the decline in the number of persons tried. The figure for 1893 was 6,095, for 1903 only 3,752, a decrease of 38 per cent. in the 10 years.

Larceny from the person is essentially a "professional" crime, and, so far, this decrease in its prevalence would indicate a decline in the number or activity of "professionals," as a class, but unfortunately this indication seems to stand alone, and the balance of evidence appears to be the other way. The fact probably is that we have here an example of a movement taking place among professional criminals closely analogous to the "migration of labour" from a declining trade to others which are more flourishing. Owing in great measure to the opportunity this crime affords for the exercise of effective vigilance by the police, it is probably now much less lucrative in proportion to its risks than many others, burglary and shopbreaking in particular, so that it is only natural that the pickpocket, who will no doubt be able to turn his adroitness to good account in the practice of other modes of preying on society, should tend to forsake his chosen calling, and that novices entering on the career of crime should also try their fortune in other directions.

The figures relating to another offence included in this

class—obtaining money or goods by false pretences—are not uninteresting, and exemplify rather well some of the results of a change in the law which simplifies the proceedings applicable in the prosecution of a particular offence. By the Summary Jurisdiction Act of 1899, obtaining money or goods by false pretences was made an offence triable summarily: between 1893 and 1898 the number of persons tried (that is on indictment) had fallen slightly, from 950 to 890; the Act just named came into force in the middle of 1899, and in that year the number tried on indictment sank to 748, and in 1900, when the Act was working throughout the year, to 394; but the *total* number of persons tried for the offence had increased rapidly, namely, from 893 in 1898 to 1,435 in 1900, for whereas in the former year summary proceedings were taken against only 3 persons, in the latter year no less than 1,041 were tried summarily. Since 1900, that is till 1903, the numbers of the persons tried for this offence, on indictment and summarily, increased steadily, and in about the same proportion, but the number tried on indictment in 1903 (502) was still far below the annual average (908) for the five years preceding the commencement of the Act. Now had we looked only to the figures giving the number of crimes of the kind *reported to the police* we should have observed only a steady increase from 1899 onwards, and might have been led to suppose that there had been a corresponding increase in the prevalence of the crime. It is possible that there was some increase in these years, but that this was of the magnitude of the increase in the number of persons tried or crimes reported is certainly not the case; the effect of the introduction of the simpler procedure had been to transfer immediately a considerable proportion of the cases to the Courts of Summary Jurisdiction, and at the same time greatly to increase the number of cases in which *proceedings were taken*.

In the case of another class of offences—setting fire to growing crops or commons—with regard to which the Act of 1899 made similar provision, the same effects did not follow; for while, since the Act came into force, the majority of the cases have been dealt with by the Courts of Summary Jurisdiction, the total number of crimes reported has shown no tendency to increase. The explanation of the difference probably lies in the different attitudes of the persons who had suffered injury in the two ways, for probably the majority of those swindled of money or goods preferred, and still prefer, to take action in the civil rather than in the criminal courts, and there would thus be a far greater proportion of these who would be induced by the simplification of the procedure to take criminal proceedings, than of persons whose crops had been fired.

Turning to the offences in Class V, we see that there was, in 1903, a slight increase in the number of persons tried for crimes against the currency. The numbers are not large, but there was also a corresponding increase in the number of crimes reported to the police, so that there appears to have been a recrudescence of the crime, which followed on a very long term of years during which these offences had progressively decreased from very large to very trifling numbers. In the years 1857–8 the average number of crimes against the coinage reported to the police per annum was 2,365 (a figure which, though it cannot be strictly compared with the figures for more recent years, at least indicates that the offence was very prevalent), and in the same years the number of persons tried annually was 724 (or 31 persons tried per 100 reported crimes); the corresponding figures for the period 1884–8 were 566 and 306 respectively (54 persons tried per 100 crimes); by 1894–8 the figures had fallen to 204 and 110, and the fall was continued steadily till 1902, when only 101 crimes of this kind were reported

and 59 persons tried; in 1903, however, the figures rose again to 142 and 89 respectively (it will be seen that the proportion, 63 per 100, of persons tried to offences reported, had apparently more than doubled as compared with 1857-8). It is to be hoped that this recrudescence, which appears to be real, will prove to be merely a transitory phase in the general decline of this class of offence.

As regards the "Miscellaneous Offences" included in Class IV, we see that the general increase which had obtained for many years in the number of persons tried for attempting to commit suicide (and in the number of such crimes reported to the police), as well as in the number of suicides committed, was fully maintained in 1903. The average number of persons tried annually in the period 1894-8 was 192, in 1902 the number was 241, and in 1903 it rose to 273. The numbers of the attempted suicides reported in the same years were 1,949, 2,198, and 2,399 respectively. It will be noticed how small is the proportion of persons tried for attempting to commit suicide to the number of crimes known to the police to have been committed; and no doubt a great many cases are not reported to the police at all. In the 2,399 cases known to the police in 1903, 2,343 persons were apprehended; the charges against 1,272 (the majority) were dismissed, and those against 501 were withdrawn; of the remaining 626 persons, 303 were released on bail to come up for further examination if called upon. We see from the Coroners' Returns (Table XXX) that the number of cases in which coroners' juries returned verdicts of suicide, was 3,480 in 1903, as against 3,239 in 1902, and 3,106 in 1901; the verdicts of *felo de se* in these years were only 39, 42, and 49 respectively—showing a progressive decrease.

Turning now to consider non-indictable offences, the first

thing which strikes us is the magnitude of the amount of technically criminal business transacted by the Courts of Summary Jurisdiction, which, moreover, shows a tendency to increase rather than to diminish. In 1903 no less than 811,195 criminal charges, indictable and non-indictable, were dealt with by these Courts. Of these, 791,814 were finally disposed of, 12,085 were investigated and committed for trial, and 6,568 were dismissed under the Indictable Offences Act, the defendants in the remaining 728 cases being either released on bail to come up for examination if required, committed to Industrial Schools, or otherwise disposed of. A large number of cases classed as quasi-criminal (Table XIV) were also dealt with by these Courts, for there were made, in 1903, 15,140 orders for sureties to keep the peace or be of good behaviour, 6,243 orders for the maintenance of illegitimate children, 7,962 orders for the maintenance of wives, 3,699 orders for the maintenance of children in Reformatory and Industrial Schools, etc., and 4,656 orders under the Poor Law Acts for the maintenance of families. Orders were made for payment of wages in 5,243 cases, for dealing with nuisances, under the Public Health Acts, in 3,955 cases, and for possession of small tenements in 13,253 cases.

Of the 798,814 persons tried by these Courts, 46,562 were charged with indictable offences (almost four times as many, it will be noticed, as were committed for trial), and 745,252 with offences not triable on indictment: the former we have already considered.

With regard to the 745,252 persons charged with non-indictable offences, it is important to notice that not all, not even the majority, were charged with crime of anything more than a technical character: in many cases their offences were merely "nondescript contraventions" of by-laws framed by local authorities under various public and private Acts of Parliament, or of regulations imposed in the

interest of public health, safety, or comfort. The multiplication of such laws and regulations—and hence of offences—normally accompanies social progress in a community advanced in civilization, and the increase in the number of offences now referred to can by no means be interpreted as a sign of social deterioration, but rather of a rapid increase in the tendency to impose on individual members of the community restrictions designed with a view to their own good or that of their fellows. On a perusal of the detailed Returns made by the Police of a great town or city, and particularly of the Returns of the Metropolitan Police, one cannot fail to be struck with the almost infinite variety of these by-laws and regulations. Some, of course, apply more particularly to persons in special walks of life, *e.g.*, publicans, carmen, or paupers, but the rest are so numerous and varied that it seems almost impossible that anyone, whatever his calling or station, should be able entirely to escape entanglement in the net which they weave round him.

There are, however, a number of non-indictable offences which may be regarded as of a definitely criminal character, such as assaults, brothel keeping, committing malicious damage, offences under the Prevention of Crimes Act, by licence-holders, police supervisees and other previously convicted persons, stealing animals, fences, plants, etc., and some others, and these should be given due weight in the consideration of the state of the country's crime. We find, on turning to the Tables, that the aggregate number of persons tried for these non-indictable offences of a criminal character decreased progressively for a number of years prior to 1903, while, as we have already seen, the indictable offences were increasing, at any rate since 1899. This decrease was not inconsiderable, namely, from 104,245 persons tried in 1899 to 89,451 in 1903, and, in point of numbers merely, would more than counter-

balance the increase in the figures for indictable offences. The relative importance of the offences is, however, such that it is necessary to modify but very slightly, if at all, the conclusions which we have arrived at with regard to the general increase in crime, from a consideration of the figures relating to offences triable on indictment; and it is very significant that the only offences in the class (non-indictable criminal offences) which did not share the general decrease, were those under the Prevention of Crimes Act, which are essentially offences of habitual offenders.

As regards the non-indictable offences of a non-criminal character the fluctuations in the total number of persons tried are not of much significance, for these are brought about in one direction or the other by changes in a very few offences of quite distinct characters, the figures for which are extremely high.

First of these comes the class of offences under the Intoxicating Liquor Laws. From 1895 till 1899 there was a steady rise in the number of persons charged with drunkenness, namely, from 169,298 in the former year to 214,298 in the latter; there was then on the whole a slight fall till 1902, when the figure was 209,908; but in 1903 occurred a very great rise of nearly 10 per cent. to 230,180. The greater part of this increase is no doubt attributable to the large powers given to the police by the Licensing Act 1902 (which came into operation on the 1st January 1903); for instance, in section (1), the Act authorises the apprehension of persons found drunk and incapable in public places, and it is noticeable that though the number of persons proceeded against increased so largely, the number of cases dealt with by summons, instead of by apprehension of the defendant, actually diminished in 1903 by over 11 per cent. from 64,743 to 57,504, the increase in the number of apprehensions being from 145,237 in 1902 to 172,743 in 1903; also, by section (3) of the Act, magistrates were empowered to require

persons convicted of drunkenness to give security for being of good behaviour, but previously it was the practice in certain Courts, when it was considered desirable to bind over the defendant, to deal with the case not as a criminal charge but as an application for sureties only, and as the procedure was then non-criminal such cases were not included in the statistics of prosecutions.

In the number of persons proceeded against for other offences under the Intoxicating Liquor Laws—mainly offences by publicans rather than their customers—there was a decrease in 1903 from 10,253 to 9,625, and this in spite of the fact that the Act of 1902 created certain entirely new offences. The most gratifying feature of the decrease is the substantial reduction in the number proceeded against for the offence of selling drink to children, namely, from 2,941 in 1902 to 2,440 in 1903.

The decrease which had been observed for the previous two years in the number of persons tried for offences under the Elementary Education Acts was continued in 1903, when the figure was 61,619 as against 89,657 in 1900. No doubt the decrease in the former year was accelerated by the transitional character of the period as regards the management of Elementary Schools.

The steady increase in the number of persons proceeded against for offences under the Highway Acts continued faster than ever in 1902-3. There was indeed in 1902 a slight fall in the total number of prosecutions, namely, from 42,610 to 42,258, in spite of the increase under the sub-head "Locomotives," from 1,093 in 1901 to 1,785 in 1902. In 1903, however, there was a general increase, particularly under the sub-heads "Bicycles" and "Locomotives", in the latter case from 1,785 to 3,863, or 216 per cent. as compared with 1902.

The number of persons tried for the offences of begging and sleeping out increased very rapidly from 1901 to 1903,



and there can be no doubt that this indicates a real and material increase in vagrancy, which followed, however, on a period of decrease. In the period 1893 to 1898 the average annual number of persons prosecuted for these offences was 25,067: in 1899 it was 21,174, and in 1900 sank still further to 18,791. The cause of this rapid decline is no doubt to be found in the conjunction, in those years, of brisk trade (giving plentiful employment for all classes of workers), with the outbreak of the South African War. In commenting on the marked decrease in crime generally which took place in December 1899, many chief officers of police offered in their reports, as an explanation, the fact that great numbers had been called to South Africa in connection with the war, which operated both directly by removing many undesirables, particularly from urban districts, and indirectly by stimulating the demand for other labour, whereby those who remained were occupied and kept from mischief. No doubt the same causes would also thin the ranks of the vagrants for the time being, though it would, as certainly, wholly fail to move the habitual and confirmed vagrant from his customary mode of life. After 1900, with the conjunction of slackening trade and the return of reservists and discharged soldiers from South Africa, the process was reversed, and prosecutions under the Vagrancy Acts for begging and sleeping out increased rapidly from the low figure 18,791, reached in 1900, to 29,632 in 1903. Of these 29,632 persons 20,729 were convicted, and 3,666 more, against whom the charge was proved, were discharged by the magistrates under Section 16 (1) of the Summary Jurisdiction Act, unconvicted. As would naturally be expected under the present system of dealing with this class of offenders, by far the most usual punishment imposed was a short term of imprisonment, no less than 15,782, or 76 per cent. of the persons convicted, being sentenced to imprisonment for 14 days or less: it seems a rather curious fact that in as

many as 1,378 cases fines were inflicted, and that this punishment should be twice as frequent on conviction of sleeping out as in cases of begging. It is very noticeable, too, that the fluctuations observed in the number of persons tried for the offence of sleeping out, while they follow the direction of movement of the combined figures for this offence and that of begging, are far less violent than those relating to the latter offence. Those most frequently proceeded against for sleeping out will no doubt be of the more habitual class of vagrant, and we should expect that they would be less affected by the economic changes going on around them than the promiscuous class of beggars, among whom the proportion willing to do some kind of work or other will probably be greater.

If the figures relating to the number of prosecutions for these offences in the several counties are arranged so that counties of similar population and area can be readily compared, the fact that there exists a great variety in the stringency of the measures adopted in dealing with this class of offenders, even in districts of similar industrial characteristics, is brought into clear relief; no other explanation of the wide divergence in the number of prosecutions in certain districts is possible. But it does not follow, nor does it appear to be the case, that there was in these years a material increase, in point of time, in the stringency of the measures taken in the several districts; so that the figures may fairly be taken to corroborate the general impression that there was in these years a material increase in vagrancy through the country as a whole.

How this increase must be regarded in a consideration of the country's crime in general it is rather hard to decide. It has been said that vagrants are a criminal class, but the proof of the prevalence among them of any of the more serious forms of crime is doubtful or wanting; they, are without doubt, guilty of a good deal of petty pilfering,

much of which never comes to the notice of the police, and they sometimes commit more or less grave assaults (though probably no more than the generality of mankind), but the true vagrant seems to be of too "feckless" a character to make a criminal whose depredations would be serious. The real menace of the vagrant as a class probably lies in the actively demoralising and degrading influence which he exercises on the ranks of society next adjacent to his own—if he can be said to belong to society at all,—for while he is left to follow the bent of his own inclinations unrestricted and unmolested, save for such slight or evanescent check as the prospect of a very short term of imprisonment can offer, the attractions which his life certainly presents to many will continue to draw others from useful walks of life, at least to become burdens, often to prey on the rest of society. Probably the region of life in which the vagrant moves must be regarded with greater apprehension in its aspect as ground whence criminals are recruited, than as the base of operations from which the vagrant himself preys on more law-abiding citizens.

In the volume of Statistics for 1903 a new Supplementary Table has been inserted, showing the amounts and the appropriation of fines imposed and fees payable during the year in each Court of Summary Jurisdiction. The fines amounted to £265,427, the fees to £422,413, or about 60 per cent. more than the fines. Of the fines, £42,887 was payable to police superannuation funds, £5,629 to the Exchequer, £25,704 to various persons unenumerated, £46,950 was not levied, or remained unrecovered either temporarily or on the committal of the defendant to prison in default, and the remaining £144,258 was paid over to the county and borough treasurers. As regards the fees, £35,898 was payable to the police for service of summonses, execution of warrants, and so forth, £41,567 was payable to other persons, £72,022 was remitted or not recovered, and

£272,925 paid over to the treasurers. In these sums paid to treasurers are included £42,027 for fines, and £12,246 for fees in the Metropolitan Police Courts, payable to the Receiver for the Metropolitan Police District.

It seems impossible, from an examination of the figures presented in this Table, to get any glimpse of a rule governing the relation of the amounts of fees and fines in the various Courts. Even in the same county the proportions for the several Courts were so varied, that, while at some the fees were in excess of the fines (as was in general the case); in others it was the reverse; and, as an example of the diversity in this respect existing between different districts of the country, it may be mentioned that, omitting the Metropolitan Police Courts, the highest proportion of fines to fees occurred in some of the Lancashire and Durham boroughs and the mining district of South Wales, while the same was characteristic of Huntingdonshire and Lincolnshire (parts of Kesteven)!

There has in recent years been a steady increase in the number of appeals to Quarter Sessions against convictions by Courts of Summary Jurisdiction; this increase has been altogether out of proportion to the increase in the number of cases dealt with, but is still remarkably small compared to the enormous amount of work done by the Courts. In 1899 there were 121 appeals, in 43 of which the conviction was quashed; this was about the normal number for the six preceding years. The number then rose steadily till 1903, when there were 191 appeals, 67 of which were successful. London and Lancashire always provide between them a considerable proportion of the appeals—in 1903, 67 of the 191 for the whole country—and a considerable proportion of the appeals are always against convictions under the Intoxicating Liquor Laws: in 1903 there were 87 such, 61 being in relation to the offence of permitting drunkenness on licensed premises (Table XV).

There was in 1903 a further considerable increase in the number of receptions into prison, consequent mainly on the increase which we have noticed in the summary proceedings taken. (Tables XXXI to XXXIV.) The total number of receptions was 223,911 as against 207,384 in 1902, and 199,875 in 1901; in 1900 the receptions were only 182,554; of these persons received into prison in 1903, 179,979 had been convicted summarily, 8,699 on indictment, and 1,049 by Courts Martial: 1,830 were surety prisoners, and 17,598 debtors.

There has been a great increase in recent years in the number of persons committed to prison in default of the payment of fines, and this was especially great in 1903, because the number sentenced to pay fines increased considerably, and also the proportion of persons who went to prison in default of payment. The change in this proportion is specially instructive. In 1893 it was 18·9 per cent., and sank steadily till 1900 when it was 14·7; after that, till 1903, it increased rapidly till the level of 1893 was in three years attained again. We seem to have here an example of the way in which economic changes affect at any rate the prison population, and it is made more striking when we remember what a very large and increasing number of offences for which fines are imposed may be committed by persons who would never hesitate for a moment in paying the fine inflicted on them in order to avoid going to prison. As a result of the change no less than 103,412 persons went to prison in 1903 in default of paying a fine, as against 78,345 in 1900; and in 1899, when 563,378 persons were sentenced to pay fines—a number considerably greater than that for 1903, namely, 552,232—only 83,855 went to prison in default. No doubt the ameliorations in prison discipline introduced under the Prison Act, 1898, will also have had some share in bringing about this result in the latter part of the period in question. It is noteworthy in this

connection that the number of debtor prisoners received into prison increased very rapidly in the period preceding 1903. In 1899 the total number of debtors imprisoned was 12,706, of whom 7,867 were County Court debtors, and 4,839 were committed by Courts of Summary Jurisdiction; the numbers for both classes of prisoners increased steadily, till in 1903 they were 10,544 and 7,054 respectively, giving a total of 17,598 debtor prisoners, or 36 per cent. more than in 1899.

There is one striking change in magisterial practice in recent years which has tended to check to a slight extent the growth of prison populations; that is, their increasing disposition to take advantage of the provisions of sect. 16 (1) of the Summary Jurisdiction Act, 1879, which empowered them to discharge a defendant against whom a charge of a trifling character is proved, without convicting him, but only, if they think fit, ordering the payment of certain damages and costs. In 1893, 21,277, or 386 per 10,000 convicted persons, were discharged under that section; in 1903, no less than 40,020, or 579 per 10,000 convictions.

A striking feature of the prison returns is the rapid decline in the number of children received into prison in recent years. (Table XXXVI.) This, unfortunately, cannot be regarded as an indication of a corresponding decline in juvenile crime, for reference to the Tables relating to the age of persons convicted (Tables VIII and XIII), shows that the number of children convicted of indictable offences when under 12 years, and also the number convicted between 12 and 16 years of age, though subject to fluctuations, remained on the whole of about the same magnitude for the 10 years up to 1903; and, though here we are able only to estimate, the number convicted of non-indictable offences probably increased. The change in the receptions of children into prison is only attributable to a growing disinclination on the part of magistrates to commit children

to prison, and the proportion of those so committed was in 1902 and 1903 very small indeed.

In 1903 no less than 2,309 children under 12 years old, and 6,082 between the ages of 12 and 16, were convicted of indictable offences; we only know the number convicted of non-indictable offences after apprehension—not those proceeded against by summons: the numbers for children of these two ages were 170 and 2,536 respectively. That is, at least 2,479 children under 12, and 8,618 between 12 and 16 were convicted, but the numbers of children received into prison after conviction were only 10 and 1,109. In 1893, although the numbers convicted were very much the same, the receptions of children into prison were 150 and 2,774 for the two ages respectively.

With regard to the children sent to prison it is gratifying to learn from the Report of the Prison Commissioners for the year March 1903-4 how satisfactory and encouraging have been the results of the system of transferring children sentenced to sufficiently long terms of imprisonment to certain selected prisons where they are subjected to special training, supervision, and reformatory treatment; and these results have been attained in spite of the shortness of the majority of the sentences, which very severely handicaps any efforts to make an impression on the children deep enough to be lasting.

Attention has been drawn more than once to the length of the detention in prison of many persons awaiting trial, some of whom are, of course, acquitted subsequently. The figures for 1903 (Table XXXIX) show little improvement on the preceding year, but as compared with earlier dates they appear rather more satisfactory, especially as regards the number of cases in which the detention was very long, say over 8 weeks. In 1895 no less than 18·4 per cent. of the persons subsequently convicted were detained for more than 8 weeks, and 3·2 per cent. for more than 16

weeks; the percentages in 1903 were only 12·8 and 1·9 respectively. The improvement was still more marked in the case of persons acquitted, for whereas in 1895 13·3 per cent. of such were detained for more than 8 weeks, and 11·1 per cent. in 1898, the percentage in 1903 was only 7·4. The hardship in the case of persons who are subsequently convicted is not so great, for in some cases at any rate the fact that they have been awaiting trial for a long period will be taken into account when sentence is passed, and though this be not done the offender deserves at least some punishment, and in many cases the balance of advantage for the community at large, if not for the individual in question, will be on the side of an arrangement whereby he is kept in seclusion for an additional period. Of the 9,685 persons tried on indictment and convicted, only 1,349 were released on bail pending trial; but it is satisfactory to note that of the 2,190 persons tried and acquitted, 1,078, or nearly half, were granted bail; nevertheless, some reform of the judicial system seems to be called for, when in 1903, in spite of the great shortening of proceedings to which we have already called attention, it was possible for 14 persons who were finally acquitted to be kept in prison for over 16 weeks, 44 for periods between 12 and 16 weeks, and 103 between 8 and 12 weeks. A remedy which has been frequently suggested and which, if applied, would remove a very considerable portion of the cause for complaint in this matter, is the reform of the circuit system by which, outside the Central Criminal Court district, Courts of Oyer and Terminer and Gaol Delivery are not held more than four times annually in any county, and must be held at least twice in each, however small the number of cases for trial. In connection with this suggestion it is interesting to observe that, in 1903, in no less than 25 of the 55 counties for assize purposes there were less than 20 cases for trial in the whole of the year, and in 14 only 10 cases or less.



Table XXVIII is interesting as indicating, to a certain extent, the time of year at which crime of various sorts is most prevalent: in this Table is given the number of indictable offences reported to the police and the number of apprehensions made in each month of the year. For the purpose of examining these figures we have taken the average number of crimes reported in the three years 1901 to 1903. It is clear at once that the times of year when the several crimes are most prevalent differ widely. Offences against property without violence, that is practically larceny in some form or other, seem to be steadily maintained throughout the eight months February to September inclusive, the average number of cases reported monthly at this time of year being between 5,300 and 5,500 (save for June, when in each of the three years examined there was a marked drop to about 5,000); but in October and November the cases increased to 6,000; then came a reduction in December to 5,700, followed by a great increase to 6,250 in January, which in each of the three years claimed most cases of all.

The case of offences against property with violence, that is practically burglary, house-breaking, etc., is rather different, for while crime of this kind seems to increase in the last two or three months of the year, and to be most prevalent of all in January, there is a second strongly-marked maximum in the middle of the summer—August especially—when the crime is nearly as prevalent as in January: this, no doubt, is an accompaniment of the holiday season, when so many houses are left more or less untenanted.

The case of offences against the person is different again, for we find that in such there is a strongly-marked time of maximum prevalence in the summer months, May to August, the highest point falling in July, and from this maximum such crimes become regularly less and less prevalent towards the beginning and end of the year.

In the particular case of the offences of rape and inde-

cent assaults on females this variation is very striking, the average number of cases reported in July being, in the three years examined, 120, while for the months December to February the monthly average was only 50. This is no doubt due in large part to the greater freedom with which people walk in the open air in the summer months, especially in country districts.

A very similar fluctuation takes place in the number of attempts to commit suicide reported to the police, there being a particularly strongly marked maximum in July, and a regular falling off towards the beginning and end of the year. The average number of cases reported in July of the three years was 270; next came June and August with about 230, while for the three months, December to February, the monthly average was less than 140, about half the figure for July.

Turning next to the Coroners' Returns (Tables XXIX and XXX), we see that there was in 1903 a slight decrease in the number of inquests held, which was 35,861 (70 per 1,000 deaths), as against 36,092 in 1902, and an annual average of 36,383 for the period 1898 to 1902. In 13,924 of these cases the jury found that death was due to natural causes, 14,093 of the deaths were found to be accidental, and in 2,357 cases open verdicts were returned. Deducting two cases of justifiable homicide and 27 executions of persons condemned to death, there remain only 5,268 deaths ascribed to criminal violence or culpable neglect, of which the majority (3,480) were suicides. We have already alluded to the increase in recent years of the number of suicides. The abnormal number of inquests on illegitimate children, to which attention has frequently been called in past years, was as great as ever in 1903. The number of inquests on legitimate children aged under one year was 5 per 1,000 of legitimate children born in 1902; the corresponding figure for illegitimate children, including some cases

of children whose parentage was not known, was 29 per 1,000.

Table LIII deals with the exercise of the Prerogative of Mercy. In 1903 one Free Pardon and 13 Remissions of penal servitude or imprisonment were granted on grounds affecting the original conviction, that is, on account of fresh evidence raising reasonable doubt as to the prisoner's guilt, or establishing his innocence, or else altering the view taken as to the gravity of his offence. The majority of the 124 persons to whom remission was granted on medical grounds would be women undergoing short terms of imprisonment who were near their confinement, and who, if longer detained, would not be fit for discharge at the expiration of their sentence. In 14 cases the capital sentence was commuted to penal servitude for life, 54 remissions of a portion of a term of imprisonment were granted in simple mitigation of sentence, and on the same ground 49 convicts undergoing penal servitude were granted their release on licence earlier than it would have followed in ordinary course. Remission was granted to prisoners as reward for giving information or rendering assistance in the interests of Justice, in 21 cases. In the case of 142 convicts at liberty on licence, remission was granted of their obligation under the Penal Servitude Act to report themselves monthly to the police. These men will have been convicted of offences, usually some form of violence against the person, not involving dishonesty, and have had no record of dishonesty against them; in all cases inquiry as to their mode of life will have been made from the police of the district where they resided after their release, and the obligation to report will not have been remitted unless this report was satisfactory. In the great majority of such cases the reports are satisfactory, and men convicted of some crime of sudden violence or passion and sentenced to penal servitude, seem quite able to settle

down again to life in the outer world on the completion of their sentence without having been demoralised into criminals. This is, perhaps, contrary to the general opinion; at least it is contrary to an opinion to which expression is often given.

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## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### San Domingo.

THE United States have a difficult task to perform in adjusting their policy under the Monroe doctrine to the situation created by the failure of the smaller American Republics to meet their obligations to European States. But the precedent of the action of Great Britain, Germany, and Italy against Venezuela has no doubt determined the present action of the American Government with regard to San Domingo, which, like Venezuela, owes money to Belgian, French, German, Italian, and British creditors. A treaty has been prepared between the United States and San Domingo, the practical effect of which is to associate in the financial control of the latter's affairs American officials, who will take charge of the Custom houses and pay 45 per cent. of their gross receipts (estimated at nearly a million dollars per month) for the purposes of the Dominican administration, and apply the remainder in satisfaction of the foreign and domestic debts of the State, estimated at thirty-two million dollars, the United States guaranteeing the integrity of the State and undertaking to adjust all debts. (*Daily Chronicle*, March 27, 30.) As difficulties have been raised in the way of the treaty being ratified at present, it is reported that the American President has agreed with the San Domingo Government that action to this effect shall be taken pending

the completion of the treaty, and it would be expected that no objection would be raised by the other Powers concerned, on assurance being given that no discrimination shall be made between the different classes of creditors, though it is said that the Belgian creditors, who hold half the obligations, have not agreed to it. (*Times*, March 29—April 6.) The position would be the counterpart of that in Egypt, except that the control is limited to a specific financial operation, and is as yet unofficial, but it may well be that the force of circumstances will necessitate a closer relation between the United States and San Domingo, similar to that between the United States and Cuba, after the operation of restoring the financial stability of San Domingo is completed.

The idea is not a new one, as annexation of San Domingo to the United States was strongly urged by President Grant in 1869 and 1870; a treaty to that effect was proposed in 1869 to the Senate but rejected, and a commission was sent by General Grant, which examined the resources and conferred with the leading citizens of the Republic, and finally reported in favour of the proposal. Similarly, in 1865, Hayti, which comprises the rest of the island, requested the United States to guarantee its sovereignty over Samana, its principal port, and a convention was prepared for the lease of the peninsula and bay of Samana to the United States, but the former request was refused and the latter was rejected by the Senate. San Domingo has shown its international existence in various ways since 1833, when it was recognised as independent by Spain, its former sovereign (to whom its Executive thought of reverting in 1861). It is a party to the Industrial Property Conventions of 1883, 1891 and 1900, the Postal Union (1885, 1891 and 1897 Conventions), the Submarine Cables Protection Conventions of 1884 and 1887: but not to the Hague Convention,

though it has treaties of Arbitration with Salvador (1882) and Hayti (1895): and it has commercial treaties with Great Britain and other Powers, and a treaty of reciprocity with the United States (1891). The course of events points to Hispaniola (*i.e.*, Hayti as well as San Domingo), joining or adhering to the United States in the same way as Cuba: but the policy of "accretion not colonisation" (Wharton, *International Digest*, sect. 61), propounded in 1844 by the then American Secretary of State, takes a long time to realise, and the reluctance of the American Senate to extend the responsibilities of the Union beyond the mainland has still to be reckoned with. The negotiations with regard to the Danish West Indies are another instance of deferred realisation of long-standing American conceptions. In 1866 the United States offered to purchase them for five million dollars: Denmark asked fifteen millions, and offered to sell two of the three (not Santa Cruz) for ten millions. In 1867 a treaty was concluded for the sale of all three islands for seven and a-half millions: this was ratified by Denmark, but failed to secure ratification in the American Senate; and quite lately, it will be remembered, a similar treaty which had been accepted by the United States failed to obtain ratification from Denmark. (Wharton, sect. 61 A.)

### Morocco.

The situation in Morocco caused by the apparent intention of the German Emperor to disregard the Anglo-French Agreement of last year, under which France acquired the concession of Morocco as a sphere of influence, is an excellent example of the effect which an agreement between two States for reciprocal abstention from territorial expansion, as Professor Westlake describes it in his new book (*International Law, Peace* 129 [1904]), has on the rights of third parties. It is a *res inter alios acta*, which

can give no legal rights against States other than those which have formally adhered to it; and Professor Westlake criticises, with apparently deliberate disfavour, the "popular notion, that after the publication of an agreement of this kind between two Powers, and the lapse of a considerable time without third Powers protesting or signifying their reserves, the obligation of abstention is extended to third Powers by an understanding, and a sphere of influence is thus created generally, and not merely as between the parties." He observes that in strict law there are two answers to this, first, that "silence only damages where there is occasion for speech," second, that "what it is sought to build on the foundation of silence, a commencement of appropriation without a commencement of effective occupation, does not exist in International law;" and he will only allow that "the utmost which can be said in its favour is that the agreement encourages a hope in the party entitled to it, which it would be unfriendly in the third State to thwart, after it has long been entertained, without warning." The great authority of the learned author, approved by M. Nys (*Revue de D. I. & L. C.* 1905, p. 70), thus no doubt supports the reported German claim of absolute equality for German commerce and commercial rights in Morocco, its refusal to allow any other Power to obtain preferential advantages there, and its intention to deal directly with the Sultan as an independent sovereign. The Fashoda incident in 1898 between England and France, however, furnishes a precedent the other way: there it will be remembered that one of the positions taken up by Lord Salisbury was, that "if France had throughout intended to challenge the British claims (to the Soudan) . . . she was bound to have broken silence" (see these Notes, Vol. XXIV, 366): and that was a case of a claim to territorial sovereignty requiring much more support than a claim to influence only. No doubt, as Professor Westlake points

out (*ubi sup.* 121), this was perhaps rather a supplemental than a principal argument: and in that case France had recognised one of the agreements, *inter alios* (the Anglo-Congolese lease of 1894), to the extent of obtaining from the Congo State a renunciation of its rights under it. But the doctrine of notice is one of growing validity in modern International law, due to the increasing closeness of international relations and the recognition of the increasingly juridical nature of these relations implied in the establishment of the Hague Tribunal; and, especially with regard to acquisitions of territory or spheres of influence in Africa, any State which is a party to the Berlin Convention of 1885 is justified in expecting its co-signatory States to give full effect to the doctrine. Unless reserves were made by the German Government when the Anglo-French Agreement was brought to their notice (whether formally or not) a year ago (and the effect of any such must be seriously discounted by the absence of protest in the official statements made by responsible statesmen at the time), the German attitude at the present time is an unfriendly one, if its aim goes farther than the preservation of its treaty rights in Morocco. That these are not menaced by the Anglo-French Agreement is clear from the provisions that France undertakes not to alter the political status of Morocco; Great Britain recognizing that it appertains to France as a Power whose dominions are co-terminous for a great distance with those of Morocco, to preserve order in that country, and to provide assistance for the purpose of all administrative, economic, financial, and military reform which it may require, and undertaking not to obstruct action taken by France for this purpose if it leaves untouched the treaty rights of Great Britain with Morocco: commercial liberty is assured for thirty years, and the two Governments engage to furnish to each other diplomatic support for the execution of the clauses relating to Morocco and Egypt



(Arts. 2, 4, 5). The French Foreign Office has, moreover, declared its intention of respecting the economic interests of other nations, while putting an end to anarchy in the country. If the rights of France in this case only rest on a moral obligation or understanding, implied from the fact of no objections having been made by any other of the society of States to her arrangement with England, it is quite possible for a moral obligation to acquire the force of a legal one in International law by hardly perceptible degrees; and on practical grounds, in a matter where two parties have concluded a mutual agreement, public international opinion will not favour an assertion of rights by a third party, which is made after that agreement has been in force long enough to constitute a regularised situation.

### **The Brussels Maritime Law Conference.**

The object for which the International Maritime Committee has been working since its inception in 1898, namely, the unification of Maritime law, has attained a first stage towards realisation in the official conference which took place on February 21—25, at Brussels, and was attended by representatives of Belgium, France, Holland, Italy, Japan, Norway, Spain, Sweden, Russia, and the United States. As before mentioned in these Notes, the British Government, while as yet unwilling to take part in an official conference on this subject, has expressed its friendly and sympathetic interest in the project; and as the conference has adjourned its further sittings to September 1, owing to the amendment made in the original proposals laid before the conference, there is still time for the leading maritime Powers (England and Germany) to come into line with the other States. It must be remembered that, from the very fact of the large superiority of the British mercantile marine, the proposed changes in the law will affect

British shipowners more than those of any other country; and they are not likely to be content with a separate system of liability at home, when their ships are subjected abroad to one general code giving them greater practical advantages. The Committee are convening their next conference at Liverpool on June 14—17, for the discussion of the subjects of shipowners' liability and the relative ranking of maritime liens; and it is hoped that a definitive agreement will be reached on the former point between British and Continental systems, and that uniform rules dealing with the latter point will be adopted.

### The North Sea Incident.

The findings of the International Commission on the inquiry into the disastrous encounter between the Russian Baltic Fleet and the Hull fishing fleet on October 21st last, satisfy general legal anticipation. The Commissioners were of opinion that the Russian theory of fact was unfounded, there being no torpedo boats or destroyers with the fishing fleet, and no justification for the Russian ships opening fire or continuing their fire in the way they did; but that no fault is to be found with the conduct of the Russian admiral or officers as regards military valour or humanity, *i. e.*, that they *bonâ fide* believed in their idea of the facts which led to the unfortunate result. This conclusion has been criticised as not drawing the logical deduction from the premisses; but a quasi-criminal inquiry on an international question is a delicate matter, and it is reasonable that, in a reference to an International Commission of naval officers investigating the conduct of a belligerent fleet in a sudden emergency, the action complained of must be established beyond all doubt to be either deliberate or negligent in the highest degree, to have a criminal responsibility attached to it, in addition to the civil responsibility admitted by the Russian

Government. It was strongly urged at the time, and (as now appears from the recently published Blue-book, *Russia* No. 2 [1905], Cd. 2, 350), it was specially insisted upon by the British Government from the first (10) that Russia should give a definite undertaking to punish any persons found responsible. Russia for a long time objected to the Commission being given power to apportion responsibility for the disaster, on the ground that this assumed the culpability of the Russian officers concerned, and the Russian Government did not ask for any guilt or responsibility to be attached to the fishermen; and the Russian Foreign Minister urged that, until the inquiry had been made, the question of punishment could not be discussed, while declaring that the consequences of responsibility would have to be borne by the Russian officers according to the Russian law, if the inquiry placed it upon them, just as would correlatively be the case with the fishermen if they were in fault. The British contention, however, ultimately prevailed, that the Commission must be authorised to deal with the question of blame, and the Declaration between the two Governments provided that the Commission should inquire into and report upon all the circumstances relating to the North Sea incident, and particularly the question as to where the responsibility lies, and the degree of blame attaching to the subjects of the two States, or of other countries in the event of their responsibility being established by the inquiry (57). Both parties seem to be entitled to the credit of proposing the settlement of the question by the method actually adopted, Lord Lansdowne suggesting, on October 27th to the British Ambassador at St. Petersburg (10), an independent Court of international character, of which the procedure might follow the lines of Arts. 9—14 of the Hague Arbitration Convention; and the Ambassador on the following day informing him that the Czar proposed an International Commission of Inquiry,

as contemplated by the same Convention. From the outset till nearly the end of the negotiations, the Russian Government understood that the stipulations of the Hague Convention would be the sole basis of the agreement, while the British conception was that of a tribunal with wider powers (51): and it was agreed that the Declaration should, if inconsistent with them, over-ride Arts. 9—14 of the Hague Convention (49), though these were taken as the basis of the Convention. The final result is the most emphatic testimony to the value of the Hague Conference as the starting point of a new order of international relations, and to the essential stability of the instrument of international justice which it created. The official correspondence also brings out the value of the personal factor in international questions, the Foreign ministers of the two countries being enabled to pay each other the high compliment of mutual assurances that the pacific result obtained was to be attributed to the careful moderation of language and peaceful tone of discussion on both sides (14—19).

## CONFLICT OF LAW.

### (1) Quality of Property.

The quality of property, *i.e.*, whether it is real or personal, movable or immovable, is decided by the *lex situs* (Foote, 202: Dicey, 513). Accordingly, where an Italian by origin, who had become a naturalised British subject and acquired an English domicil, made a holograph will in Italy in Italian form, bequeathing to his wife the usufruct for life of all his property wherever it was situate and existing, and the wife survived and the will was proved in England, it was held that the will came within Lord Kingsdown's Act (1861, 24 & 25 Vict., 114, s. 1), regarding wills of "personal estate," and the widow was entitled to the beneficial interests in English leaseholds of the testator as personal estate,

although such property is also internationally treated as immovable (*Re Grassi*, *Law Journal*, March 25; 21 Times L. R. 343; cf. *Freke v. Lord Carbery* [1873], L. R., 16 Eq. 461; *Pepin v. Bruyère* (L. R. [1902], 1 Ch. 24). A similar question has been considered recently in the Scottish Courts (*Chrystal v. Brathwaite* [1905], 12 Scots L. T. 730). A native of British Guiana made a will there which he declared to be his last will, "in order to prevent any doubts or disputes arising after my death as to the disposition of my effects in or out of the colony"; and afterwards left the colony and lived at Glasgow, where he died; and as he was illegitimate the Crown was entitled to his property, which included heritable estate in Scotland, unless the will validly disposed of it. The Court decided that the *lex fori* was to be applied to interpret the will, as no special meaning was averred to attach to the word "effects" according to the law of British Guiana, and that in the case of heritable (real) property the *lex situs* must decide how it should pass (Lord McLaren): that though it is a rule that where a will is executed in the country of the testator's domicile, it must be interpreted according to that law, yet that a will expressed in ordinary language and containing no technical terms must be given its ordinary meaning, and the Court interprets it for itself (Lord Kinnear): and that the Titles to Land Consolidation (Scotland) Act of 1868, s. 117 (31 & 32 Vict., 101), did not make the word "effects" carry heritable estate in Scotland any more than did the ordinary law (*ibid*). The decision has been disapproved, as giving a formalist interpretation (*Law Times*, March 11). Assuming, which is not absolutely established, that the interpretation of a will or conveyance relating to immovables is governed by the *lex situs*, and the law of Guiana is immaterial, the decision does not seem to give full effect to the spirit of the Scottish statute, of which "the real object is to deal with phraseology" (*Connell's Case* below). It must be remembered that

no heritable estate in Scotland could be devised by will before 1868, but since then it will pass under a foreign will (*Purvis' Case* [1861], 23 D. 812; *Connell* [1872], 10 M. 627); and a more liberal interpretation would have allowed the evident intention of the testator—which should be the decisive consideration in such cases—to prevail, if not definitely excluded by the *lex situs* and *lex fori*.

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## (2) Capacity.

In another recent Scotch case (*Law Times*, March 11), a decision was given which seems open to doubt. A domiciled Englishwoman made a will in English form, and some years after married a domiciled Scotchman in England, but the married life was spent at Aberdeen, where she died without revoking her will. The Sheriff Substitute held that the will was not revoked by marriage, but the Sheriff reversed this, apparently on the ground that the will was revoked by the act of her becoming a Scotchwoman. If Scotch law in this respect were the same as English, this could not be disputed; but if not, and an ante-nuptial will remains valid after marriage, it would seem that an English Court would have come to a contrary decision, on the authority of *In re Martin* (L. R. [1900], P. 211), where a Frenchwoman, having made a will in French form, married a Frenchman domiciled in England and died domiciled in France, and the will was held to be revoked by the marriage. A question was there raised as to whether this revocation by act of law was part of the testamentary or of the matrimonial law of England, two judges expressing conflicting opinions; but the view has been expressed that the effect of the decision is to favour placing this provision in the latter branch of law (*Hirschfeld, L. M. and R.*, Vol. XXVI, 349, 350; *Foot*, 332).

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### (3) Tort.

In *Evans v. Stein* ([1904], 42 Sc. L. R. 183), the ordinary rule that the quality of an act is governed by the *lex loci delicti* coupled with the *lex fori* was followed. A firm carrying on business in England sued a firm carrying on business in Scotland, for defamation contained in letters and a telegram sent from Scotland by the defendants to the plaintiffs in England: the tort was held to be committed in England, and as it was not an actionable wrong in England, owing to there being no publication there, no action lay in Scotland. (See *Francis v. Carr*, L. R. [1902], App. Cas. 176.)

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### (4) Jurisdiction.

The mutual limits of jurisdiction observed between English and Scottish Courts have been illustrated in several recent cases. In *Carbon S. C. v. Seton* ([1904], 12 Scots L. T. 191), a domiciled Scotchman was chairman of a company which went into liquidation, and being its debtor for calls on shares amounting to nearly two thousand pounds, he compromised with the company and got a discharge by payment of seventy-five pounds, though its consent was not obtained by statutory means (see *Cyclemakers C. S. C. v. Sims*, L. R. [1903], 1 K. B. 477). The English Court granted a supervision order to certain creditors, under which the creditors took proceedings in the Scotch Courts in the name of the company against the defendant to enforce the claim for calls due from him to the company, on the ground of the nullity of the compromise and under the order of the Court of Supervision. The Court held that though the action was competent, the Court was not *forum conveniens*, and ought not to exercise jurisdiction and encroach on the province of the English Court, the question of the validity of the compromise *inter alia* being one of English law.

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In *Cathcart v. Cathcart* ([1904], 12 Scots L. T. 182), a Scotch husband had married an English wife, and they had each charged their respective properties (Scotch land and English land) with a life interest in the other's favour if surviving: they were divorced from each other in Scotland, and the wife subsequently became insane: and the husband applied to a Scotch Court to release him from his obligation to his wife under his marriage settlement, and to declare him entitled to the right given him by the wife's marriage settlement on her death. The Court, while granting the first claim, held that real estate in England was beyond its jurisdiction, and the fact of there being a matrimonial settlement did not alter the case, as there were questions of English trust law involved in the wife's settlement, and the Court could not give practical effect to its decision, as English Courts would not be bound to recognise it.

In another case (*Tyne Improvement Commissioners v. Aktieselskabet Aalborg Dampskibselkab* [1905], 12 Scots L. T. 693), a Scotch Court was called upon to be auxiliary to an English plaintiff against a foreign shipowner, whose vessel had sunk in their (English) port, in order to recover the balance of the expenses incurred by them in raising her under their statutory powers over her salved value. Under these powers they were entitled to raise or sell any wreck, and retain the moneys up to the amount of their expenses, and to recover the balance from any person who was either owner of the vessel before she became a wreck, or was its owner after it became so . . . . "by proceeding in an action before any Court of competent jurisdiction." The plaintiffs made arrestment of another ship belonging to the defendants in Scotland *ad fundandam jurisdictionem* and obtained judgment, this remedy being available for all claims for debt, whether arising *ex contractu* or *ex delicto*, and whether the person resorting to it against a foreign defendant is a domiciled



Scotchman or a foreigner: and the words "competent Court" not being restricted to English Courts. "A vessel entering a port must obey the law in force there, and her owner is liable to be sued for a debt incurred under that law in any Court to whose jurisdiction he is subject by the operation of its own curial rules" (Lord Stormonth-Darling). The words of the local Act, in this case, are wider than those in the case of *Barraclough v. Brown* (L. R. [1897], App. Cas. 615, *Aire and Calder Navigation*): and the decision constitutes a salutary precedent of international jurisdiction.

G. G. PHILLIMORE.

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#### VIII.—NOTES ON RECENT CASES (ENGLISH).

COMMENTING on the decision of the Court of Appeal in *In re Hanbury, Hanbury v. Fisher* (L. R. [1904], 1 Ch. 415), we said (at p. 344 of our issue of May, 1904), we considered that decision wrong. The House of Lords have since then reversed it, Lord Lindley alone dissenting. Apparently, the ground of the reversal is precisely the same as that put forward by us. As, however, the case has not as yet been reported, we reserve further remarks upon it.

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We remarked in our last issue how a particular point, after lying dormant for years, will suddenly come up for decision almost at the same moment in two or three different cases. Further examples occur in this year's reports. Thus, the extent of the estate conveyed under an executed trust, where no technical words of limitation are used, has not been till lately considered by the Courts since *In re Whiston's Settlement* (L. R. [1894], 1 Ch. 661). It has, within the last six months or so, been the subject of no less than three decisions, viz., *In re Tringham's Trusts, Tringham v.*

*Greenhill* (L. R. [1904], 2 Ch. 487) ; *In re Irwin, Irwin v. Parkes* (L. R. [1904], 2 Ch. 752) ; *In re Oliver's Settlement, Evered v. Leigh* (L. R. [1905], 1 Ch. 191). All these cases laid down this rule as to the limitation of equitable estates—that technical words of limitation are not necessary where the intention to create a fee is clear—a rule which has more the appearance than the reality of convenience. Again, a point never before decided, namely, whether in taking a mortgagee's accounts where the mortgagee has sold part of the mortgage estate, a general rest should be given, or merely a rest as to the proceeds of sale, was decided in November, 1904, in *Wrigley v. Gill* (L. R. [1905], 1 Ch. 241), and in January, 1905, in *Ainsworth v. Wilding* (L. R. [1905], 1 Ch. 435). In both cases the Court held that the mortgagor was not entitled to a general rest. In the same way, the point decided in *In re Bradshaw* (L. R. [1902], 1 Ch. 436), which has not till recently been before the Court again, is the subject of two cases decided the other day nearly simultaneously. That case turned on the doctrine of election. A testator, who had a special power of appointing a fund among his children, by his will appointed life interests in it to his children, and the corpus of the fund among his present and future grandchildren, and then he bequeathed property of his own to his children. The appointment to the grandchildren being bad, as contrary to the rule against perpetuities, the question arose whether the children could claim the corpus, as in default of appointment, without making compensation out of the property given them by the testator, which of course they should have to do if the appointment had been bad merely as being to persons not objects of the power. Kekewich, J., in *In re Bradshaw* (*supra*), held that they should. In *In re Oliver's Settlement* (*supra*), Farwell, J., and in *In re Beales' Settlement, Barratt v. Beales* (L. R. [1905], 1 Ch. 256), Warrington, J., refused to follow him.

The ground of both the latter decisions was, of course, that the Court cannot allow the doctrine of election to be used to validate, in effect, a gift which is contrary to law. It can scarcely be doubted that these decisions are technically right. But the practical effect of them will only be to defeat the intentions of testators who know nothing about the rule against perpetuities, or the nature of special powers. The intention of the testators in both cases (*supra*) might have been effected by the simple process of bequeathing the testator's own property to the grandchildren. As the whole object of the doctrine of election is to make in effect valid a gift which is in fact void, it does not seem altogether unreasonable to extend it to making in effect legal a gift which in fact is unlawfully made, but which, but for the testator's mistake, might have been made lawfully.

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It is curious to observe how little attention is paid by law writers, when dealing with the effect of innocent misrepresentation, to the distinction between contract and conveyance. Yet the decisions clearly show, that while innocent misrepresentation is a good ground for rescinding a contract, it is no ground at all for rescinding a conveyance or assignment, unless perhaps on the ground of total failure of consideration (*In re Glubb* (L. R. [1900], 1 Ch. 354). The distinction has just been taken in *Seddon v. The North Eastern Salt Company, Limited* (L. R. [1905], 1 Ch. 326). In that case shares were sold by a vendor who it was alleged induced the purchaser to buy them by innocent misrepresentations. After the purchase was completed, the misrepresentations were discovered, and an action for rescission of the assignment commenced. Joyce, J., after discussing the distinction in a very learned and interesting judgment, dismissed the action.

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It is doubtful in our opinion whether the decision of Kekewich, J., in *Hemmings v. Sceptre Life Assurance Ltd.*

(L. R. [1905], 1 Ch. 365), can be maintained. There a lady entered into a contract of life assurance with the defendants. In answer to a question, she stated by mistake that she was three years younger than she really was. This answer was, with others, expressly made the basis of the contract of insurance, and, of course, the amount of the premium payable by her was fixed by it. Subsequently the mistake was discovered. After it came to the defendants' knowledge they nevertheless received several premiums on the policy. The insurance money was payable on the lady attaining the age of sixty. On her attaining that age her assignee sued the defendants for a declaration that the policy was good, and for the payment of the insurance money. The defendants did not contest the validity of the policy, but contended that they were not bound to pay the insurance money until the time she would have attained sixty, if she had in fact been when she became insured of the age she represented herself to be. His Lordship held that, after they learnt the mistake, the defendants might have returned the premiums and avoided the policy, but having received premiums after they learnt the mistake, they could neither avoid it nor refuse to pay the insurance money on her actually attaining sixty. It seems somewhat unfair, to say the least, that when a person chooses to contract on the basis of her own representation as to a certain state of facts, the only remedy the other party should have, when it is found that the representation is mistaken, should be either to rescind the contract or to carry it out, not on the basis of the representation, but on the basis of the actual facts. Why should the lady be permitted to deny her own representation? We had always thought that the only person who could claim the rectification of a misrepresentation was not the party who made it, but the party to whom it was made.

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The decision of Buckley, J., in *In re Isaac, Harrison v. Isaac* (L. R. [1905], 1 Ch. 427), also seems questionable. There, a testator, after giving a large number of pecuniary legacies and one specific legacy, directed that all "the remainder" of his "property" should pass to certain persons in defined shares. Then he appointed his executor his "residuary legatee." Some of the legatees having died in his lifetime, the question arose whether their legacies lapsed to the persons entitled to the "remainder" of his "property" or to his "residuary legatee." His Lordship held they went to the former, and that all that his "residuary legatee" could in any event take was a lapsed share in the "remainder" of the testator's "property." But "the remainder" of his "property" does not include lapsed and void legacies. The rule that the person who takes it takes these also, is only a device to prevent intestacy, and applies only when the testator expresses no intention to the contrary. Here it would certainly seem the testator did express an intention to the contrary. He left the remainder of his property to one set of persons, and nominated his executor to be his "residuary legatee"—that is, to take all property he had not effectively disposed of by his will.

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Note that a person who is a lunatic so found, however sane he may have become, may not, while he is a lunatic so found, make a disposition of his property by deed, though he is quite at liberty to make a disposition of it by will (see *In re Walker (a lunatic so found)*, L. R. [1905], 1 Ch. 160). The distinction is as plain as a pikestaff once you know the reason—but you've got to know that first.

J. A. S.

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The pretensions of "Ancient light," nourished with such care by Equity, had been so generally accepted, that assaults upon the assured position of the doctrine seemed like attacks

upon tradition. But attack follows attack. The lofty claim, supported in *Tapling v. Jones* (L. R. [1865], 11 H. L. C. 290), that after enjoyment for twenty years without interruption, a right to undiminished light becomes absolute in the dominant tenant, was upset by *Colls v. Home and Colonial Stores* (L. R. [1904], A. C. 179), noticed in our number for August last, No. 333, p. 487. And now, *Ambler and Fawcett v. Gordon* (L. R. [1905], 1 K. B. 417; 74 L. J. R., K. B. 85; 92 L. T. R. 96) comes as a consequence of this case, and holds that enjoyment, for the full term, of a special light to the knowledge of the owner of the servient tenement, will carry no right beyond that remnant which *Colls v. Home and Colonial Stores* left of the old doctrine. It had formerly been held in *Lanfranchi v. Mackenzie* (L. R. [1867], 4 Eq. 430) that to support a claim to special light, such knowledge must be shown. It is noticeable that Bray, J., by whom *Ambler v. Gordon* was decided, was, when at the Bar, the counsel in *Colls v. Home and Colonial Stores*, whose argument was favoured by the House of Lords.

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In many cases the value of a house would be augmented by an increase, subsequent to the erection of the building, in the cost of materials and labour; and perhaps it was on this similitude of relation that in *London, Deptford, and Greenwich Tramways v. London County Council* (L. R. [1905], 1 K. B. 316; 74 L. J. R., K. B. 143; 92 L. T. R. 124) the plaintiffs claimed, as consideration for the purchase of their line by the London County Council under powers of the Tramways Act 1870, that to the surveyed valuation should be added that contribution which the company would have had to make if the tramway, instead of being constructed when it was, had been built at a later date after it had become a general condition to the granting of new lines that the concessionaires should pay part of the cost of widening streets along the track which were of less than a given width. And

the claim was supported by an *obiter dictum* of Lindley, J., that the value of a tramway was what it would cost to lay it down. But neither the arbitrator to whom the matter was first referred, nor the Court to which the point was submitted, were able to see that the Company was entitled to be paid for what it had never been required to do.

Convenience or financial facilities may lead promoters of a joint stock adventure to have the undertaking formed in a country other than that in which the enterprise is to be pursued. To exercise control in such an arrangement, the laws of California affix upon stockholders of a corporation carrying on business within the State, a personal liability in a certain ratio for the debts of the undertaking, even though the company may be constituted under the laws of a foreign nation. *Risdon Iron and Locomotive Works v. Furness* (L. R. [1905], 1 K. B. 304; 74 L. J. R., K. B. 243) was an unsuccessful effort to enforce in our Courts this extra liability against shareholders in a limited company formed to work mines in California.

The difficulties of legislation are well illustrated by the Workmen's Compensation Acts of 1897 and 1900, which were a benevolent effort to amend the Employers' Liability Act, itself an amendment of the doctrine of common employment, which limited the Common law liability of an employer for personal failure to exercise reasonable care for the safety of his servant. The avoidance of disputes was one of the hopes that were entertained; but, around the Compensation Acts have grown up a maze of decisions that form a literature of themselves. To this wilderness of single instances, *Aylward v. Matthews* (L. R. [1905], 1 K. B. 343; 92 L. T. R. 189), and *O'Brien v. Dobbie and Son* (L. R. [1905], 1 K. B. 346), have respectively added to the "building," which the Act defined, a temporary platform erected for a crane, and a ladder used for carrying out at the required height the work of repair. T. J. B.

## SCOTCH CASES.

An interesting case, illustrative of the law of slander, was reported last quarter (*M'Ewan v. Watson*, 42 Sc. L. Rep. 213), in which a medical man in Edinburgh was sued for breach of confidentiality and defamation. The averments of the pursuer were that she had confidentially consulted the defender, as a medical expert, with a view to an action for judicial separation to be brought by her against her husband, and that two years later in the course of the action, the defender, although reminded that he had already been consulted by the pursuer in the matter of the action, examined her as a medical expert on behalf of her husband, and disclosed in the witness-box certain matters which he alleged he had ascertained as the result of his prior examination. These the pursuer alleged to be false and slanderous, as well as made in breach of confidentiality. The defender pleaded privilege, but the Court (dissenting Lord Young) allowed an issue for defamation, holding that the statements of the defender concerning the pursuer as innuendoes were slanderous. An issue for breach of confidentiality was, however, disallowed, in respect that, so far as actionable breach of confidence was averred, the alleged wrong was covered by the issue allowed for defamation. Issues proposed by the pursuer, based upon the evidence given by the defender in the witness-box in a judicial proceeding, were unanimously disallowed, but it was held by a majority of the Court that the same privilege did not extend to information given privately to the husband, or his legal advisers, which led to the defender being called as a witness.

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The case of *Dobell, Beckett & Co. v. Neilson* (42 Sc. L. Rep. 279) forms a fitting sequel to that of *M'Dowall & Neilson's Trustees v. J. B. Snowball Limited*, reported last quarter (*ante*, p. 227). Both cases arose out of the bankruptcy of



the same firm of timber merchants, and so far as the simple right to stop *in transitu* was concerned, the later case expressly followed the ruling of the earlier one. But the case of *Dobell & Co.* presented some complications, particularly in respect of the rights of the unpaid seller as against a party to whom the buyer had transferred the cargo by way of pledge under sect. 47 of the Sale of Goods Act 1893. In answer to the claim of the sellers to the cargo, a third party produced a bill of lading indorsed by the bankrupts to him, and pleaded that the seller's right of stoppage could only be exercised subject to the right of security in his favour to which the indorsed bill of lading was meant to give effect. It appeared that the bill of lading had been indorsed and handed over in exchange for delivery orders affecting a cargo already stored, but that these delivery orders, forming the consideration for the indorsation of the bill of lading, were not themselves valid as a security, having been intimated, not to the warehouse keeper, but to a firm of measurers, who were so closely identified with the bankrupts that they were not in law independent custodians (*Anderson v. M'Caul* [1866], 4 M., 765). The transaction under which the delivery orders were exchanged for the indorsed bill of lading having taken place within sixty days of the bankruptcy of the indorsers, and the consideration given for the indorsation not being "valuable," it was an illegal preference, and therefore reducible under the Act 1896, c. 5. In these circumstances it was held that no "valuable consideration," within the meaning of sect. 47 of the Sale of Goods Act 1893, had been given for the indorsed bill of lading, and that the unpaid seller's right of stoppage was not affected by it.

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An instructive view of the personal status of a liquidator was presented in a recent Sheriff Court case at Glasgow. (*County Council of Lanarkshire v. Brown* [25 January 1905],

12 Sc. L. T. Rep. 700). The liquidator had continued the occupation of manufacturing premises for about two months of the year constituting a new assessment period, and had arranged with the landlord for payment to him of a rent proportionate to the extent of the prolonged occupancy. The pursuers were a rating authority, but they did not, and in fact could not, give notice of the assessments until long after the occupancy had ceased. The notice was then left at the vacant premises and did not reach the liquidator. Before the liquidator had actual notice of the claim he had divided the whole estate among the creditors of the company, in terms of sections 142 and 143 of the Companies Act 1862, and the company was thereafter dissolved and struck off the register. The pursuers then claimed the amount of the rates as a personal debt, due by the liquidator on the following grounds:— (1) the liquidator having undertaken responsibility for the rent for part of the period to which the assessment applied, he became personally liable for the rates; and (2) he was personally liable in respect that he had negligently failed to ascertain and make provision for the rates applicable to the premises for the year into part of which the company's occupation had extended. It was also contended by the pursuers that rates were in law entitled to special privileges over ordinary debts. The defender resisted personal liability, because (1) he had acted throughout *in bonâ fide* and in strict accordance with his statutory duty; (2) the assessment was made against the company and not against him as an individual; (3) he was a mere agent or manager for the company, and, differing from a trustee in bankruptcy, he was not vested in the company's estate (*Clark v. West Calder Oil Co.* [1882], 9 R. 1017). The Sheriff-Substitute (Balfour) held the liquidator personally liable, founding chiefly upon *International Marine Hydropathic Co.* (L. R. [1885], 28 Ch. D. 470); *National Arms Co.* (L. R. [1885],

28' Ch. D. 474); *Blazer Fire Lighter Ltd.* (L. R. [1895], 1 Ch. D. 402). On appeal the Sheriff-Principal (Guthrie) reversed, and held that the liquidator had incurred no personal liability. A review of the authorities cited and founded on in the judgment of the Sheriff Principal, satisfies us that the suggestion of personal liability was, in the circumstances, very properly dismissed. The cases cited by the Sheriff Substitute have no bearing upon the point at issue. They involved no question of personal liability, and merely determined that "beneficial occupation" by the company inferred a preference over the ordinary creditors to which, if claimed in the statutory manner, it would be the liquidator's duty to give effect. On the other hand, we have clear authority in support of the appeal judgment. As to the non-vesting of the liquidator, and the distinction in this respect between his position and that of a trustee in bankruptcy, we have a host of English cases, and notably the Scottish case already referred to of *Clark v. West Calder Oil Co.* On the general question of the non-liability of the liquidator in the circumstances mentioned, many cases might be cited, but it is enough to refer to *Knowles v. Scott* (L. R. [1891], 1 Ch. D. 717), where most of the older cases are noted. In answer to the contention that rates are in the circumstances specially privileged, and are not subject to the ordinary rules applicable to the winding up of companies, we may refer to the explicit statement to the contrary *per* Kay, J., in *Wearmouth Crown Glass Co.* (L. R., [1882], 19 Ch. D. 640, at p. 642). Other considerations all point to the soundness of the ultimate judgment. The company, and not the liquidator, having been placed on the Valuation Roll, and thereupon assessed, there is no warrant under the Rating Acts for a personal claim against the liquidator. If the company was the real debtor, then, the liquidation being under the supervision of the Court, leave to bring the action should have been first asked and obtained. Finally, on the

same assumption of the debt being due by the company, an affidavit and claim should have been lodged with the liquidator, in terms of sect. 49 of the Bankruptcy Act 1856, incorporated into company law by sect. 4 of the Companies Act 1886.

R. B.

### IRISH CASES.

A rather curious case upon the effect of the general presumption against crime, is *Harvey v. Ocean Accident Corporation* ([1905], 2 Ir. R. 1). A man holds a policy of insurance against death from the effects of bodily injury, sustained by accident, from an outward, external and visible means or cause. His dead body is found in a river; how it came there, no affirmative evidence shows. Suicide is an excepted risk in the policy. Is his death within the risk insured against in the terms just stated, so as to make the insurers liable? The matter was somewhat complicated by the way in which it came before the Court—on a case stated by an arbitrator; but the Court of Appeal unanimously answered this question in the affirmative. There was no evidence of foul play, and therefore that clearly could not be presumed. There remained, therefore, only the alternatives of accident or suicide. The Court were of opinion that since suicide is a felony, the presumption against crime should operate to turn the scale against it also. It is well settled that that presumption applies where it becomes necessary to establish the commission of a crime in a civil action, just as strongly as in criminal proceedings. There seems to be no English authority turning directly on suicide; but Holmes, L.J., referred to an American case, *Walcott v. American Life, &c.*, mentioned in the *Addendum* to the last edition of *Taylor on Evidence*, where it is said to have been held in a civil action that a death, if there is no evidence as to its cause, must be presumed to have been natural and not

suicide. There was more doubt as to a second question, namely, whether proof, satisfactory to the directors of the Corporation, of the cause of the death of the deceased, had been given, within the meaning of the terms of the policy. Although the Court answered this question also in the affirmative it is not clear how far their answer could bind the directors, or how far the directors are bound to be satisfied with a legal presumption instead of affirmative proof.

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The decision of the Divisional Court in *Heiton v. M'Sweeney* ([1905], 2 Ir. R. 47), upon the validity of a by-law, seems doubtful. A County Council provide by their by-law, in substance, that the *owner* of any vehicle upon a street at night, shall cause to be attached thereto a lamp so placed, lighted, and kept lighted, as to show a light in the direction in which the vehicle is proceeding: and in default the owner is subjected to a penalty. Is this *ultra vires*, as making a master criminally responsible for the act of his servant? Or is it not at all events unreasonable? The majority of the King's Bench Division say no to both questions; but we must confess to a preference for the dissenting judgment of Gibson, J. The by-law punishes a master who may have taken all possible precautions in the way of securing proper servants, providing proper lights, and giving orders for their lighting, if the servant, even for some purpose of his own outside the scope of his employment, and even, perhaps, with the object of injuring his master, leaves the vehicle unlighted. The servant, who may be the really guilty party, escapes altogether. It does seem that "the difficulty has been caused by taking a form of by-law applicable to the case of a driver, and substituting therein the owner for the driver." No doubt many statutes have (contrary to the ordinary rule) made a master criminally liable, in particular cases, for the act or default of his

servant ; but that a by-law can validly do so seems open to serious question.

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*Tobakin v. Dublin S. D. Tram Co.* ([1905], 2 Ir. R. 58) exhibits a new, and indeed rather an audacious, claim for privilege against discovery. The defendant company were sued for negligence. Shortly after the occurrence complained of, they had sent an inspector to interview the plaintiff; the inspector had taken down a statement made by the plaintiff as to the occurrence, which the plaintiff (an illiterate) had signed with his mark. The defendants objected to disclose this statement, on the ground that it was a privileged communication which they obtained for the purpose of litigation. No doubt ; but it had been obtained *from the plaintiff*; it was a document in which he had an interest, by which he would be bound at the trial, and which it was therefore most material for him to see. In fact, it was his document, as much as the defendants'; and the Court were quite clear that it was not in any way privileged. The point seems a plain one, and is only noteworthy from its novelty.

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For some reason, cases of "secret trust" seem common in Ireland ; perhaps because testators of the humbler class thereby expect somehow to prevent litigation among their relatives—an expectation usually disappointed. *O'Brien v. Condon* ([1905], 1 Ir. R. 51) is a case of this kind. The testator bequeathed all his personalty to the clergyman who prepared his will, "to be distributed as he thinks right." He desired the clergyman, verbally, to distribute the property, after paying debts and other expenses, among five named persons, in such proportions as he thought fit ; and to this the clergyman assented. This the Court described as "a typical instance of a secret trust." No question was raised as to the shares in which the beneficiaries would be entitled ; it seems to have been assumed they would take

equally, as otherwise it is difficult to see why the trust might not be void for uncertainty. There is, however, a more interesting point in the case. One of the persons named by the testator had witnessed the will. Did she lose her benefit under the trust, by reason of sect. 15 of the Wills Act? That section provides (substantially) that if any person shall attest a will to whom any devise, legacy, etc., shall be *thereby* given or made, that devise, legacy, etc., shall, so far as concerns such person, be void. Apart from authority, the Master of the Rolls said he should have no difficulty in holding that this beneficiary did not take anything under the will, but took solely by virtue of the secret trust not disclosed on the will; and that therefore the section did not deprive her of this benefit. There is, however, a decision on the point in *In re Fleetwood* (L. R., [1880], 15 Ch. D. 594), where Hall, V.-C., decided under somewhat similar circumstances that as an attesting witness was intended to be a beneficiary under a parole trust, the trust failed as to her. In the present case, the Master of the Rolls decided not to follow *In re Fleetwood*. He thought that the point now involved had not then been argued, and that the decision was contrary to principle. As to questions of conflict between English and Irish authorities, he remarked: "English judges do not consider Irish decisions binding on them, though they always treat them with respect. Where there is no conflict with Irish cases, we are in the habit of treating English decisions as governing us here, though technically, perhaps, we may not be bound by them. If there is a conflict of principle between an English and an Irish case, we, in Courts of first instance, are bound to follow the Irish decision." On the whole, then, as the case before him was a small estate, and as it would be a hardship to put the parties to the cost of an appeal, he thought it better to give effect to his own opinion, notwithstanding *In re Fleetwood*.

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Generally speaking, there is no jurisdiction in a Court of Equity to order a successful party to pay all the costs of the suit. That this rule does not apply broadly to persons holding fiduciary positions, is shown by *In re Ireland & Co.* ([1905], 1 Ir. R. 133). Two directors of a company, which was now in voluntary liquidation, had joined in drawing cheques on the company's bank account for the private purposes of a third director. The liquidator applied to the Court, on summons, to determine whether these sums had been expended *ultra vires* and in breach of trust, and if so, to order their repayment by the directors. On taking accounts under this summons, it turned out that, on the whole account, the third director had made lodgments to the company's credit greater than the sums drawn out, so that the company had in fact sustained no money loss. Being of opinion, however, that the directors had been guilty of gross neglect and breach of duty, in thus virtually mixing trust-moneys with their own, and that this neglect was the cause of the litigation, the Court ordered the directors to pay the costs of the summons and inquiry. It was held by the Court of Appeal that there was jurisdiction to make this order. "When a trustee has dealt with trust funds, or a director has managed the affairs of a company, in such a way as makes the ascertainment of the property subject to the trusts, or the assets of the company, impossible without an action, there is a right to sue, quite irrespective of whether the misconduct has caused pecuniary loss; and the jurisdiction to make the offender pay costs does not depend thereon."

J. S. B.

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## Reviews.

SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*The Law of Partnership.* By LAWRENCE DUCKWORTH. London: Jordar & Sons. 1905.

Mr. Duckworth has dealt clearly and satisfactorily with the Partnership Act 1890, and produced a book which should be useful both to business men and lawyers. This double aim we think accounts for what at first rather puzzled us. In his introduction, which is good and clear in itself, he gives a number of passages, some of them being citations from judgments, and some parts of the Act, which are afterwards repeated word for word in the notes to the various sections of the Act. We rather gather that the introduction is intended primarily for the business man, and the notes for the lawyer. There are some good explanations of such points as "goodwill," "novation," "estoppel," etc.; and all the most recent cases seem to be included. Full citations are given from some of the most important cases. We have noticed a few small slips. The reference to *Leverson v. Lane* on page 15 should be 13 C. B., N. S., not 3 C. B., N. S.; the reference in the Table of Cases to *Bridgman v. Daw* should be 40 W. R., not 43 W. R. The account of the case of *Bank of Australasia v. Breillat*, on page 19, omits to state that the respondent Company carried on business as the Bank of Australia; and lastly, Sir Samuel Romilly was never Master of the Rolls.

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*Barrister-at-Law.* By JAMES ROBERT VERNAM MARCHANT, M.A. London: William Clowes & Sons. 1905.

Mr. Marchant has filled a gap in legal literature by his learned and exhaustive essay. He supplies a real want, and members of the profession should feel grateful to him. He has had a task of no slight difficulty, as so much of the law that regulates the profession is unwritten and not always of the clearest description. The Bar Council has done much towards defining this law, but we doubt if it has much power to enforce it, and regret that the gradual decay of the circuit system has to a certain extent removed the most powerful check on irregular practices. The whole subject is fully worked out, and there is much information that is new to most of us.

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*The Annual Practice 1905.* 2 Vols. By THOMAS SNOW, M.A., CHARLES BURNEY, and F. A. STRINGER. London: Sweet & Maxwell.

*The A. B. C. Guide to Practice 1905.* By FRANCIS A. STRINGER. London: Sweet & Maxwell.

*The Yearly Supreme Court Practice 1905.* By M. MUIR MACKENZIE, T. W. CHITTY, S. G. LUSHINGTON, and J. C. FOX, assisted by P. M. FRANCKE and S. WILLIAMS. London: Butterworth & Co.

There are no very great alterations in the 1905 *Annual Practice*. The Rules of the 30th November 1903, 14th January 1904, and 13th August 1904, have been added in their proper places. The resolutions of the General Council of the Bar, in their Annual Statement for 1903-4, have been added to their early resolutions. Some of the Notes have been revised. For instance, Mr. Kilburn has revised those on the Admiralty Order and Rules; Mr. Edward Bray those on Discovery and Inspection; and Dr. Blake Odgers, K.C., those on Pleading. The work seems as indispensable to the practitioner as ever, and we think it rather remarkable that it still keeps comparatively handy in size.

Mr. Stringer's useful little A. B. C. is intended for use with the *Annual Practice*, to which it constantly refers, and it gives the practice in an alphabetical order in a very convenient way. It sometimes raises points which are not noticed in the larger work; as, for instance, the ambiguity of the term "not less than seven days before" in dealing with the entry of an action for trial at an assize.

The *Yearly Supreme Court Practice* has, in the edition before us, one great advantage over its rival; it is only in one volume and that not a thick one. It owes this advantage to both mental and material qualities, that is to say, it is more concise, and it is printed on India paper. This year the note on Contempt is considerably developed, and the other notes have been carefully revised; but it does not provide the same amount of information or number of cases as the *Annual Practice*.

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*The Yearly County Court Practice 1905.* Two vols. (in one.) By G. PITT-LEWIS, K.C., Sir C. ARNOLD WHITE, and E. H. TINDAL ATKINSON, assisted by A. W. GANZ, LL.B. The Chapter on Costs and the Precedents of Costs, by M. TURNER. The Chapter as to Employers' Liability and Workmen's Compensation, Revised and Re-edited by Judge WOODFALL. London: Butterworth & Co.

*The Annual County Courts Practice 1905.* Two vols. (in one.)  
By WILLIAM CECIL SMYLY, K.C., LL.B., and WILLIAM JAMES  
BROOKS, M.A. London: Sweet & Maxwell.

This year's editions of books of County Court Practice are of unusual importance, as they contain and deal with the County Courts Act 1903, which only came into force on the 1st of January in the present year. The great change made by the 1903 Act was to extend the jurisdiction of the County Court by raising the limit of £50 to £100. It has also increased the number of the jury from five to eight, though we do not know the reason for this change, nor whether it is likely to be an improvement. We suppose the flood of actions under the Workmen's Compensation Act has rather slackened, though we have not noticed that point referred to by Judge Woodfall in the notes which he has contributed to the *Yearly County Court Practice*. The Licensing Act 1904 may cast further business on the County Court judges, but at present they have escaped it, as the rules contemplated by that Act have not yet been issued. Mr. Morten Turner's chapter on Costs and the Precedents of Costs in the *Yearly County Court Practice* strikes us as very useful. Both works have had great labour and care bestowed on their revision, and all those who practise in County Courts should feel grateful to the Editors.

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*Digest of the Law of Discovery.* By EDWARD BRAY. London:  
Sweet & Maxwell. 1904.

*Bray on Discovery*—long the leading text-book upon its subject—has not for several years been republished, because the Author has from year to year contributed to the *Annual Practice* all his learning upon the matter, and all the cases which bear upon it. But it is hard to gather *principles* from the *Annual Practice*; and the present work usefully sets forth the principles relating to the law of Discovery in sixty-seven articles. We can most thoroughly recommend both practitioners and students to study the principles so appearing; the cases are admirably explained and discussed. The book is more than a mere digest of cases. Take, for instance, the case of *The Attorney-General v. The Mayor, Aldermen and Citizens of Newcastle-upon-Tyne and Hill Motum* (L. R. [1899], 2 Q. B. 478), perhaps the most important case of recent years affecting the law

of Discovery. In that case, Lord Justice Vaughan Williams suggested that it might be that a document impeaching the party's own title ought to be produced if it at the same time supported some affirmative set up by the opponent, but that, where no such affirmative title was set up, a party ought not to be compelled to produce a document on which he proposed to rely as supporting his case, merely because it contained something which suggested a flaw in his title, and might tend in that way to assist the opponent's case. If, however, the document tends to support the opponent's affirmative title, the other assertions could not be truly made, and therefore this assertion is not wanted, while if the impeaching matter is a mere weakness or defect of evidence, it ought not to entail production, whether the opponent sets up an affirmative case or not. It is submitted by Mr. Bray that there is no necessity for insisting on this assertion at all in any case; the real question is whether the document contains anything tending to support the opponent's case, and if this is specifically denied it should be sufficient. This subject might possibly have been a little further elaborated. What is a party's case? Is it the mass of his affirmative allegations, or may it be partly negative? We gather, indeed, what the Author's answer to this question would be: but is there any authority upon the point? Every practising barrister knows that these questions of Discovery are often more important in practice than any questions which arise upon the trial of an action in Court. The practice in relation to the matter is upon the whole well established: there are some rules as to when Discovery will be granted, and other and different rules as to when production of documents will be compelled, and there are yet other rules as to interrogatories. No one probably knows more upon the subject than Mr. Edward Bray, unless it be some student who has committed the work before us to memory.

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*Trust Investments.* By HERBERT ELLISSEN. London: Clowes & Sons. 1904.

This is a most useful work, but the Author himself points out its limitations. Trustees have not got a *carte-blanche* within the four corners of this table of investments. They must take, as the late Lord Justice Cotton observed, such care in conducting the business of the trust as a reasonably cautious man would use, having regard not only to the interests of those who are entitled to the income,

but to the interests of those who will take in future. (*In re Whiteley, Whiteley v. Learoyd*, L. R. [1883], 23 Ch. D. 347). The first page of the book before us sets forth this judgment 'and others to the like effect; and if the trustee will first master the principles therein appearing, and then study the information contained in the rest of the book, he will not be likely to err for lack of knowledge. At the same time, a prudent marriage settlement will, in our opinion, itself limit the trustees to investments which the settlor can himself trust. The common form investment clauses are far too wide; and the statutory provisions are a great improvement on them. But the settlor whose children's fortune is at stake should be careful that it is impossible for them to speculate at all, even with the consent of their trustees, with the money upon which they have to live and bring up their own family in turn.

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*Law in Business.* By H. A. Wilson. London: Methuen & Co. 1904.—This book forms one of a series of volumes—compiled by experts—dealing with all the most important aspects of commercial and financial activity. It follows, therefore, that the subjects are treated in a popular manner, and the books will be found of great value to those who wish to obtain merely a general view of the subjects dealt with; but lawyers will hardly be likely to consult the present volume, which serves its purpose by pointing out to business men, in plain language, void of all unnecessary technicalities, some of the chief pitfalls which they should steer clear of. Contracts are treated somewhat fully, and cheques and negotiable instruments, bailments, principal and agent, landlord and tenant, and bankruptcy, are all touched on in such a way that no business man, or woman, can fail to derive substantial benefit from a perusal of the book, and should they require any further legal advice they would do well, instead of seeking it in books, to consult a respectable solicitor.

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*The Law of Innkeepers.* By E. A. Jelf, M.A., and C. J. B. Hurst, LL.M. London: Horace Cox. 1904.—This is a work on the Law of Innkeepers and not on the Law of Licensing. From the preface the authors seem to have originally contemplated treating of the latter in the work, but subsequently they abandoned the notion. They abandoned it because the "unsettled state of public opinion on the subject seems to portend continual alterations of the law."

Two other reasons might be given for such a course. In the first place, there is no necessary connection between the subjects. A house of entertainment where alcoholic drink is supplied is no more an inn than a house of entertainment which does not provide such drink for its guests. And in the next place, a short treatise on the Law of Innkeepers is wanted, while a new treatise on the Law of Licensing is not. The authors treat their subject under four heads:—The Inn, The Guest, The Innkeeper's Liability for Goods, and the Innkeeper's Lien. There is also an Appendix of Statutes. The book is clearly written, and makes not merely instructive, but amusing reading—a quality not characteristic of law books generally. As far as we have been able to test it, it seems accurate and up to date.

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*An Epitome of the Law relating to Easements.* By T. T. BLYTH. London: Sweet & Maxwell. 1905.

This is a new volume of what is known as The Students' Series. The chief objection to this series is, that all the works, being sold at about the same price, must be more or less of the same size, no matter how large or how small the subject of them may be. Thus, the first of the series deals with the Law of Real Property. Now, it seems reasonable to hold, that if that subject can be adequately treated in some 150 small pages, the same number of pages must be far too much for the adequate treatment of the Law of Easements, which constitutes about a hundredth part of the whole Law of Real Property. As we have not read the other volumes of the series, all we can say is that easements do not appear to be treated at undue length in this work: they are treated in a very satisfactory way. The arrangement of the matter, which in a book for students is of the first importance, is clear and natural. The Author deals first with the Nature of Easements. We could have wished he had dealt with this at a little greater length, and made clearer, that though not property, easements are yet proprietary rights, that is, *jura in rem* and not *jura in personam*. Then he discusses the Acquisition of Easements, Some Particular Kinds of Easements, Extent of Easements, Disturbance of Easements, and Extinction of Easements. The subject is considered about as fully as it is in *Innes on Easements*. Students who find that work a "hard" book will probably like this better.

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*The Common Law of South Africa.* 2 Volumes. By MANFRED NATHAN, LL.D. London: Butterworth & Co.; Grahamstown, Cape Colony: African Bank Company. 1904.

With an ever-increasing amount of British capital invested in South Africa, with the ties of commerce drawing it ever closer to our great dependency, questions involving the complicated South African law must constantly be arising, and one is forced to admit that the information available on the subject is inadequate. Although to some extent English principles have been adopted, and a long list of Ordinances passed since 1902 have imparted a wholesome British leaven, the Roman-Dutch Common law remains, as is observed in the preface to the book under review, practically in its integrity. To show the wide difference between the two systems we may instance the weight attached to registration of title all over South Africa. In the old case of *Harris v. Buissinne's Trustee* (2 Menzie's Reports, 105), in which it was laid down that "By the law of Holland, the *dominium* or *jus in re* of immovable property can only be conveyed by transfer made *coram lege loci*, and this species of transfer is as essential to divest the seller of and invest the buyer with, the *dominium* or *jus in re* of immovable property as actual tradition is to convey the *dominium* of movables, and the delivery of the actual possession of immovable property has no force or legal effect whatever in transferring its *dominium*. This rule of the law of Holland was not a mere fiscal regulation. It was, with the rest of the law of Holland, introduced into Cape Colony on its first settlement, and has been acted on invariably ever since, except that by certain Colonial laws the Registrar of Deeds has been substituted for the Magistrate before whom in Holland transfers were by law required to be made." Even the Land Transfer Act has hardly brought us to the point reached three centuries ago in Holland.

Mr. Manfred Nathan, as a prominent advocate at the Transvaal Bar, is well qualified for the task he has undertaken. A great deal is contained in his two volumes. In an interesting historical introduction, the Author traces the growth of the Roman-Dutch law, which may perhaps be described as a blend of the Roman Civil law with the Customary or Common law of Holland, modified by ordinances and abrogation, and digested by a succession of great jurists such as Grotius, van Leeuwen, Voet, and van der Linden. The Dutch East India Company carried the law to the Cape, where, after the capture of 1795 it was retained, together with the *placaats*

of the Company; nor was any general change made on the annexation in 1806. The principles of the Roman-Dutch law are now applied throughout South Africa. Mr. Nathan has framed his work in the divisions customary to the Roman system, and has used numbered paragraphs. He writes clearly and with constant reference to the jurists, and seemingly, has included the latest Case law. Students, to whom these volumes may be recommended, will be struck by the wisdom of some of the principles of the Roman-Dutch law, especially in the personal relations of life. A recent deplorable case of prodigality would, we imagine, be impossible in South Africa or other country where Roman-Dutch law prevails, and where a curator of the spendthrift's goods may be appointed at the instance of near relations. Some of the rules affecting marriage also impress the reader as well founded. We hope that in his next edition Mr. Nathan will thoroughly overhaul his index, which is insufficient. We would also suggest the addition of a chapter on the law of Succession. But, taken as a whole, the book is of value.

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*The English Reports.* Vols. XXXVIII—XLVII, Chancery, 18—27. Edinburgh: William Green & Sons; London: Stevens & Sons.

Substantial progress is being made by the energetic Editors of this valuable collection, Messrs. Max A. Robertson and Geoffrey Ellis. Whereas comparatively recently it was our duty to review the earlier volumes of the Chancery Series, containing the earliest decisions, we now find ourselves in quite modern surroundings. The period concerned is the first three-quarters of the last century, and may be characterised as the legal epoch immediately anterior to the new order inaugurated by the Judicature Acts. While we have passed the great leading cases of Equity—and none of those collected, for instance, by White and Tudor are in the volumes under review—yet there is no lack of important decisions. A glance through the long list of distinguished Lord Chancellors, Lords Commissioners, Vice-Chancellors and Judges, whose decisions and *dicta* are contained in the cases, is sufficient warranty of this. The Chancellorships comprised are those of Lords Eldon, Lyndhurst, Brougham, Cottenham, Truro, St. Leonards, Cranworth, Chelmsford, Campbell, and Westbury; while among the Vice-Chancellors are included Sir John Leach, Sir Lancelot Shadwell, Sir James L. Knight Bruce, Sir



George J. Turner (to whose ruling, if our recollection serves, the present Court of Appeal recently bowed in the case of Lord Ravensworth's will), Sir Richard Tobin Kindersley, Sir William Page Wood, and Sir James Parker. Among the Masters of the Rolls are Lords Romilly and Gifford, and Sir J. Pepys, before his elevation to the Woolsack. The reports contained are those of Russell & Mylne; Mylne & Keen; Russell; Mylne & Craig; Craig & Phillips; Phillips; Macnaghten & Gordon; De Gex, Macnaghten & Gordon; De Gex & Jones; De Gex, Fisher & Jones; De Gex, Jones & Smith; Cooper *tempore* Brougham; Donnelly; C. P. Cooper (Cooper's Practice Cases); Cooper *tempore* Cottenham; and Hall & Twells.

Even in the Chancery Courts a good deal occurs of human interest, and in looking through these old reports one meets with many that must have been closely followed by the public at the time, as for example the suit in which His Royal Highness Prince Albert successfully filed a Bill against William Strange, printer, praying that the Defendants might be ordered to deliver up to the Plaintiff all impressions and copies of the several etchings, respectively in the Bill mentioned, made by the Plaintiff, and that the Defendants and their servants, agents and workmen, might in the meantime be restrained from exhibiting the gallery or collection of etchings in the bill mentioned, &c.

Among the vast multitude of decisions, we may cite a few of importance:—*Vaughan v. Buck* (wife's equity to a settlement); *Besch v. Frolich* (Dissolution of partnership—lunacy of one partner); *Clark v. Cort* (set-off); *Dillon v. Coppin* (partition); *Foley v. Hill* (customer and banker); *Glascott v. Lang* (fraud); *Moss v. Baldock* (re-hearing by Lord Chancellor); *Newlands v. Paynter* and *Owens v. Dickenson* (married woman); *Tullet v. Armstrong* (a leading decision on restraint on anticipation); *Dunkley v. Dunkley* (equity to a settlement); *Maxwell v. Maxwell* and *Padbury v. Clark* (election); *South Eastern Railway Co. v. Brogden* (interposition of equity in matters of account); *Burgess v. Burgess*, deciding that where a person is selling an article in his own name, fraud must be shown to constitute a case for restraining him from doing so, on the ground that the name is one in which another has long been selling a similar article; *Farina v. Silverlock* (dealing with trade labels); *Haynes v. Haynes*, where a mere notice to treat, followed by the death of the landowner, without either contract or the exercise of the compulsory

powers of the Lands Clauses Consolidation Act, was held insufficient to effect a conversion; *Maybery v. Brooking* (practice); *Bousfield v. Lawford* (as to selling off a debt due to a testator against a share of residue bequeathed to the debtor).

Volume XLVII, which is devoted to "Collaterals," covers much of the same ground as the volumes which we have already mentioned. On page 372 of this volume we notice the report of the case of *The Attorney-General v. The Skinners' Company*, now a case of historical interest only, but once a decision of great practical importance. It was the application of a certain Mr. Walker—formerly a practising solicitor, but not having recently taken out his certificate—that he might be discharged from the Fleet. The first affidavit complained that having been engaged all day professionally in the House of Lords, until half-past four in the afternoon, "he was proceeding to his house in Kensington by the most direct course, when he was arrested in Piccadilly by Mr. Allen, the tipstaff of the Court of Chancery," *re* the non-payment of certain costs. The Court held that Mr. Walker was privileged from the arrest in the circumstances: and further decided that going into a house on the way home to take refreshment—for two minutes only, for a biscuit and a glass of beer, which he took "without sitting down"—was not such a deviation as to destroy the privilege. This occurred in the year in which Queen Victoria came to the throne. Under the head of *Hemming v. Dingwall*, reported at page 720, the following remarks of the Lord Chancellor seem to be of general interest. "The Lord Chancellor," we read, "said it was the duty of the solicitors to know what is *the practice of the Court*." [Here we meet the phrase which to this day is of almost sacrosanct importance in the Chancery Division, where many authorities still appear to consider a neglect of the prescribed form, or a deviation from orthodox precedents, as grave a thing as errors of substance.] "He was not disposed to pay much attention to an excuse of ignorance, and more especially on plain matters. There was no apology for ignorance of that kind. He wished the profession to understand that *whatever* might be the result to *clients*, an error in practice does not always, nor in general, furnish a claim to the indulgence of the Court. Solicitors must not speculate upon indulgence, in consequence of slips of practice; if they did so, they would often mislead themselves and their clients. All cases of this kind must be determined according to their peculiar circumstances. Here it appeared that there had been a slip

or error, that must be ascribed, not to ignorance, but accidental inadvertence." [It was a question between lunar and calendar months.]

The learned reporter (Cooper, in the time of Cottenham) adds: "The reporter has frequently heard Lord Lyndhurst express his surprise that the Court of Chancery should be less indulgent than the Common law Courts to parties who have neglected to comply with the rules of procedure. In the latter, nothing is more usual than to relieve both plaintiffs and defendants from the consequence of mistakes occasioned sometimes by ignorance, sometimes by negligence, in cases altogether analogous to those in which the former have repeatedly declined to interfere. This relief is of course granted upon terms, but those terms are so well known as to be found in all the Common law books of practice. On several recent occasions, Lord Lyndhurst showed a disposition to abate the rigour of the Court; and where *no harm* could accrue to the opposing party, he *occasionally* complied with the application." Traditions die hard. The same difference between Common law and Chancery practice, although to a somewhat modified degree, obtains to-day. Words, forms, practice-rules, minutes, etc., etc., must all be according to precedent. To those trained in a Common law atmosphere, the result is always irritating, and sometimes appears positively unjust, and calculated to uphold the interests of the party who is in the wrong. But, on the other hand, it must be remembered that the work of the Chancery Division, as was that of the old Court of Chancery, is largely administrative; and administrative work and work of an organising character must necessarily be more addicted to red tape than the decision of litigated disputes. It is not an accident that Government offices are always more fettered by these restrictions than the Courts where *Nisi Prius* actions are tried. It is often said that Government offices ought to be worked on "business" lines, but even men of business have many hard and fast rules, which do not yield as occasions offer to the standard of "the reasonable man." The Court of Chancery pursued, and the Chancery Division now pursues, to some extent, a kind of *via media* between the methods of those whose work is purely administrative and the methods of those whose work is purely judicial. The editing, annotating, and printing of these volumes leave nothing to be desired.

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*International Law. Vol. I. Peace.* By L. OPPENHEIM, LL.D.  
London: Longmans, Green & Co. 1905.

The first volume of Dr. Oppenheim's new work (entitled "Peace," like that of Professor Westlake's smaller treatise noticed in this issue,) is an admirable handbook (600 pages) of Public International law, and will be equally useful as a compendium of the whole system to statesmen and jurists as to the students for whom it is designed. The book follows a lucid and natural order of arrangement; and a valuable and unusual feature is the bibliography placed at the head of each chapter and section setting out the authorities which can be consulted for further knowledge of the topics discussed (*see* especially p. 87); and similar praise must be given to the Author's extensive and impartial references to jurists of all countries. The illustrations of the various principles embrace such recent events as the North Sea incident and the Gurney Case; and the Anglo-Japanese Treaty of Alliance and the Anglo-French Agreement of last year are set out in full. Though Dr. Oppenheim is careful to cite authority for every proposition which he advances, he is entitled to full credit for the brief and business-like method in which he states and explains them, and for the terseness and clearness with which he indicates his own views. The book leaves the impression of covering the whole field of the peaceful side of International law, by the way in which it maps out the subject under well-defined and broad principles, and then clothes them with sufficient details to illustrate their practical working. Special commendation is due to the historical sketch of the subject, the treatment of the theory of State succession, and the chapter on Treaties: and the only inaccuracy met with in glancing through the book is the note on page 377, to the effect that foreigners cannot now any longer be members of the English Bar.

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*International Law. Part I. Peace.* By JOHN WESTLAKE, K.C., LL.D. Cambridge University Press. 1904.

Professor Westlake's work, though intended as a manual for practical and business men, is one which it is safe to say will be generally recognised by all persons interested in the subject as an illuminating and philosophic conspectus of the Law of Nations in their peaceful relations to each other, resembling in this respect Hall's standard treatise. Notable features of the treatment of the

subject in this little volume are (1) the close connection, whether due to actual derivation or inferred from analogy, drawn between the Law of Nations and Municipal laws—a natural bias for a great private international lawyer; (2) the valuable discussions on subjects which have hitherto received scanty notice in England, *e.g.*, the theory of State succession, and the effect of agreements for spheres of influence, especially as regards third parties, and other means of acquiring territorial or commercial rights, such as the modern “leases” of territory; (3) the constant appeals to the authority of modern jurists, *e.g.*, resolutions of the Institute (natural for a distinguished past President of that learned body), and the dicta of great advocates pleading before the recent Arbitral Commissions, *e.g.*, Sir Charles Russell in the Behring Sea tribunal; and (4) the “up to date” (to use a common term) character of the illustrations of the main principles. Possible exceptions to this last remark may be found in the absence of allusion to the United States recognition of Panama, or the status of Cuba under its treaty with the United States and the vexed question of the liability (if any) for the Spanish public debts secured on Cuba previously to its vindicating its independence, and the series of general obligatory arbitration treaties which has been lately the chief characteristic of British international relations. Special importance attaches to the Author’s statements on doubtful questions, such as the rights of insurgents, the position of Great Britain in Cyprus (in which he differs from Professor Martens); his conception of a seemingly permanent limitation of the scope of International Arbitration; his upholding of the right of a Power owning territorial waters to pursue outside those limits and apprehend subjects of a foreign State guilty of illegal action within those limits (contrary to the recent arbitral award of Professor Asser in the case of the Russian fishing vessels poaching in American waters): and the clear distinction to be drawn between sovereignty and property (*imperium* and *dominium*), so often confused together in the current idea of a sovereign having international property, and being described as owner of conquered or ceded territory. The most admirable quality of the book seems to be that it gives expression and explanation to many ideas latent in the minds of lawyers or students of the subject with a happy precision which it would be difficult to surpass. The succeeding volume will be awaited with interest.

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*The Hague Conference and other International Conferences.* By A. PEARCE HIGGINS, M.A., LL.D. London: Stevens & Sons. 1904.—This will be a very useful little work to all, diplomatists, lawyers, soldiers and the like, who have to consider questions arising out of the rules recognised by the aggregate of civilised Governments as governing the conduct of modern hostilities. The various Conventions are given in full, with cross-references to each other, and these are often instructive as showing the gradual development from theory to practice, *e.g.*, in this way one can trace the value of the work done by the Brussels Conference in 1874 as a basis for the War Convention of the Hague in 1899. The references to the chief authorities dealing with each Convention are given at the head of the text, and include foreign as well as English writers. The introduction summarises the progress made towards an international agreement with regard to war, and points out that a knowledge of International law has not, up to the present, been required for British military officers to the same extent as for naval officers. The only criticisms that suggest themselves are, that the text of the preamble of the War Convention (58), setting out the names of the signatory Powers, might be supplemented by a note on the same page giving the additional Powers adhering to it; the word "*vœu*" in the Hague Convention is hardly happily rendered by "wish;" "pious aspiration," used in the same connection, seems much more appropriate, or, if a shorter term is required, "hope" seems to convey the idea better: and the text of the Peace Convention does not strictly come within the title of the book. The present edition might well be developed hereafter into an annotated code of the International Laws of War, and in its present form it certainly fills a blank in the English literature on the subject.

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*Notes on the Doctrine of Renvoi in International Law.* By J. PAWLEY BATE. London: Stevens & Sons. 1904.—This is a monograph of distinct importance and interest dealing with a question of Private International law which has not hitherto been treated scientifically in England. There are few English decisions touching on this subject, which has been handled by many leading Continental jurists. Mr. Bate has done good service in marshalling in a compact form the authorities and arguments, *pro* and *con*, of the doctrine of *Renvoi*, testing them by a searching analysis, and supplementing them with forcible arguments of his own. The doctrine is, that where the

law of one country refers a question to the law of another, the latter "law" is not the internal law, but the law which the Courts of that country would apply to the case. Mr. Bate concludes that English Courts on the whole are not bound to accept generally the *Renvoi* theory, as their previous decisions only demonstrate a willingness on the part of English law so to enforce its rules of Private International law as not to infringe rights duly acquired under foreign systems: and he would reject the theory. Although he has against him, as he admits, the authority of Westlake and Dicey, and various *dicta* of the Courts, he shows that the numerical balance of Continental juristic authority and the majority of the Institute are on his side. This able little book is a welcome sign of the increasing interest of English lawyers in Private International law.

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**Second Edition.** *Indermaur's Principles and Practice of Conveyancing.* By CHARLES THWAITES. London: G. Barber, 1904.

Modestly described as a work primarily for students, this is undoubtedly an excellent text-book and will be found useful by the profession at large. It sets forth the principles of its subject clearly. Mr. Thwaites has thoroughly revised the book, and claims to have added nearly 300 cases. Notwithstanding this, and considerable additions to the letter-press, the size of the book has, thanks to judicious editing, hardly increased. All the recent cases of importance appear to be included. We may instance *Colls v. The Home and Colonial Stores* (L. R. [1904], A. C. 179), dealing with ancient lights; and *The Nottingham Building Society v. Thurstan* (L. R. [1903], A. C. 6), illustrating the position of one who lends to an infant on mortgage. We may refer to the useful little illustration of the rules in intestacy affecting the half-blood, on page 241, as an example of the thoroughness with which the book has been prepared.

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**Second Edition.** *Law of Affiliation and Bastardy.* By GUY LUSHINGTON. London: Butterworth & Co. 1904.

Although the proportion of the illegitimate birth-rate is becoming slightly smaller, yet the fact that in 1901 there were no less than 36,199 illegitimate infants registered shows that there must be plenty of material for legal proceedings. It is seven years or so since Mr. Lushington first brought out his little book; and though

there are no new statutes to record, there are a considerable number of new cases. Notes have been in some cases expanded into chapters; and Mr. Lushington acknowledges his indebtedness for the main part of the chapter dealing with the difficult subject of the "Settlement of Illegitimate Children" to his brother, Mr. S. G. Lushington. There still seem to be various doubtful points in the law. In *Davies v. Evans*, Huddleston, B., and Hawkins, J., differed over the question whether, in section 4 of 35 & 36 Vict., c. 65, *may* should read *must*, or whether the Justices had a discretion. Another point that does not seem to have been decided is as to the procedure on an appeal to Quarter Sessions if the mother has died before the appeal comes on; but we think Mr. Lushington's view is sound that the appeal can still be heard. There is a learned note on the "issue of summons and execution of warrants in bastardy out of the jurisdiction." We also find the forms for proceedings prescribed by the Local Government Board.

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**Third Edition.** *Saunders' Precedents of Indictments.* By HENRY ST. JOHN RAIKES. London: Horace Cox. 1904.

The original object of this work was to supply a "variety and choice of forms of indictments" not to be found in the Archbold of that day. Without that work no criminal draftsmen or lawyer can get on, but to have handy some additional carefully chosen precedents may be of considerable use to any practitioner, and most of all to those who are not very familiar with this class of drafting. Perhaps the greatest assistance will be given by the numerous precedents of false pretences, and those of indictments for perjury. An indictment for perjury is almost always a troublesome one to draw, and we think the examples given cover a very large number of cases likely to arise, notably those dealing with affiliation cases and the Licensing Acts. The introduction contains a good deal of valuable information, and the tables of "Modes of describing the owners of property," and "Modes of describing property," should prove useful.

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**Third Edition.** *Fawcett's Landlord and Tenant.* By W. DONALDSON RAWLINS, K.C. London: Butterworth & Co. 1905.

*The Law of Landlord and Tenant.* By MONTAGUE R. EMANUEL, M.A., B.C.L. London: Jordan & Sons. 1905.

Even a concise treatise on such a subject as Landlord and Tenant must be of a considerable size, and Fawcett's *Landlord and Tenant*,



under the capable hands of Mr. Rawlins, has expanded into 582 pages of text. This is, however, considerably less than the two other well-known authorities on this branch of the law; as it contains about 170 less than Foa, and much less than the portly Woodfall. The present edition has, however, grown, which the Editor considers a sign of "healthy vitality." We are certainly of the opinion that it has not been a process of "fatty degeneration." The chief causes of this increase in bulk are pointed out in the Preface, and they are principally: the alterations caused by the passing of the Agricultural Holdings Act 1900, which necessitated the re-writing of the portion dealing with statutory compensation for improvements; a new section treating of Mineral Leases and Licences; and an enlarged treatment of the subject of "public-house leases and ties." An important and very difficult question has had to be dealt with in the question of the construction of tenants' covenants to pay outgoings, etc. Mr. Rawlins has prepared two tables to show the respective streams of authorities in favour of the tenants and in favour of the landlords. The former has got very sluggish, while the latter runs stronger and stronger. We think we may quote the Editor's caustic account of the progress of the question, "which show (*i. e.*, the decisions) that the verbose ingenuity of landlords' draftsmen has been progressively successful in throwing such burdens upon tenants. It looks indeed, as if, in this respect, unless landlords become more altruistic, which is unlikely, or the Legislature interferes, which is more unlikely, or intending tenants take the trouble to consider the wording of their instruments of tenancy before they sign them, which is, perhaps, the most unlikely event of the three—the tenant's lot will, in the future, be not a happy one." It must be a satisfaction to the Editor to find that the recent case of *Woodall v. Clifton*, which was decided too late to be included in the text, but will be found in the Addenda, has confirmed his opinion, expressed on page 164, that it would be prudent, when inserting in a lease an option of purchase of the fee, to stipulate that the option must be exercised within the limit of time permitted by the rule against perpetuities.

Mr. Emanuel's little work is too slight to be of much use to practitioners, but as a well-composed, carefully-worded sketch of the legal relations of Landlord and Tenant, it should be useful to business men and others who wish to understand their position. We do not think his reference to *Rylands v. Fletcher* quite gives the

result of that decision, nor is it one that has necessarily anything to do with the law of Landlord and Tenant.

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**Third Edition.** *Corrupt and Illegal Practices at Elections.* By E. A. JELF, M.A. London: Sweet & Maxwell. 1905.—At the present time, when a general election may at any moment be sprung upon the country, a new edition of this handy and useful little work is most opportune. It consists of four introductory chapters dealing with election petitions, and some sound advice as to the conduct of elections, followed by an annotated edition of the Corrupt and Illegal Practices Prevention Acts 1883 and 1895. Mr. Jelf is well qualified to prepare such a work, since he has in his time acted both as an election agent and as counsel in election petitions: and its utility is shown by the fact that it is now in a third edition. We doubt if election agents will find a more handy or practical guide.

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**Fourth Edition.** *The Companies Acts, 1862—1900.* By A. GLYNNE-JONES, LL.B. London: Jordan & Sons. 1905.

The issue of a fourth edition of this work shows that there is a steady demand for a volume of moderate size, containing the Companies Acts and other Statutes affecting Joint Stock Companies. These Acts are carefully annotated, and reference seems to be made to all the cases, including the most recent ones. The whole forms a useful book of reference. We have only two criticisms to make. The first is, that the print of some of the notes, though clear, is too small for our eyes. The second is that it would have been better if more care had been taken over the compilation of the Tables of Cases. We have noticed that four or five cases referred to in the body of the work are not included in the Table, and there is quite a considerable number of mistakes in names, such as *Fame Electric Accumulator Co.* instead of *Faure Electric Accumulator Co.*; *London Foundries Association* for *London Founders Association*; also *Euphrates and Iyrus Steam Navigation Co.* for *Euphrates and Tigris Steam Navigation Co.* In one instance the name of the case is given wrongly both in the text and the Table. A certain case is given in the text as *Barham's Case*, in the Table as *Banham's Case*, and it really should be *Buchan's Case*.

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**Fourth Edition.** *Digest of the Law relating to the Easement of Light.* By E. S. ROSCOE. London: Stevens & Sons. 1904.

It has always appeared to us that the law of easements was a most fit subject for reducing into the form of a digest. Nevertheless, the leading works on it are in forms as little resembling digests—except perhaps of cases—as one could well imagine. In this work Mr. Roscoe, following his *Digest of Building Cases*, has reduced the law of Light into a series of rules. These rules he has stated in a clear and simple, though hardly severely accurate manner. This is due, no doubt, to the fact that the work appeared as a series of articles in a journal for the building trade. In Appendix II, the Author protests against the usual practice of law writers in coupling rights of light and air, and he contends that there can be no right of air through a definite channel except where the obstruction of the channel would cause more or less of a nuisance. Well, that is precisely what the House of Lords, in *Colls v. Home and Colonial Stores* (L. R. [1904], A. C. 179), has decided to be the law with regard to the right to light through a defined channel.

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**Fifth Edition.** *The Student's Guide to the Principles of the Common Law.* By CHARLES THWAITES. London: George Barber. 1904.—The Author of this book divides Bar students into three classes, according to the standard of their respective aspirations after knowledge. We fear that it is the third class, “those whose time is very limited and who unfortunately do not wish to, or cannot do, more than is actually necessary for strict examination purposes,” who are likely to form the chief readers of the work before us. We cannot encourage short cuts: and, indeed, they are not encouraged by the Author himself; and he claims that the study of the questions and answers in this book is suitable to all the three classes. Upon the whole, we think that the claim is justified. We have been unable to discover any inaccuracy whatever. As far as the law is capable of being stated in a short paragraph, we believe that it will be found correctly stated here. The book is brought up to date in the present edition, and the Common law has been widely enough treated to include a brief mention of those statutes which are essential to its elucidation.

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**Sixth Edition.** *A Practical and Concise Manual of the Law relating to Private Trusts and Trustees.* By ARTHUR UNDERHILL, M.A., LL.D. London: Butterworth & Co. 1904.

Although the last edition appeared in 1901, Mr. Underhill has been able to add to the present one no fewer than 230 cases. Some of these have been sufficiently important to necessitate considerable comment, notably, *In re New* (L. R. [1901], 2 Ch. 534; 70 L. J., Ch. 710). Lord Justice Cozens-Hardy has said about this case that it "constitutes the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts." Lord Justice Romer's judgment is set out at length and the case is fully discussed. Other recent cases are amply dealt with by Mr. Underhill, who has had the courage "respectfully to doubt" the grounds of Mr. Justice Buckley's judgment in *In re Redgate, Marsh v. Redgate* (L. R. [1903], 1 Ch. 536), holding that under a power to appoint to children "for such estate or estates manner and form" as the donee of the power should direct, the power was well exercised by an appointment to new trustees upon trust for sale and distribution of the proceeds among the children. Mr. Underhill, whose work is presented in the form of a "codification" of the branch of law under discussion, has added a new article since the last edition. This is entitled "By whom new Trusts created by appointments are to be carried out." The marginal and indexing work have been well done.

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**Sixth Edition.** *A Treatise on the Law of Easements.* By JOHN LEYBOURN GODDARD. London: Stevens & Sons. 1904.

When a legal treatise has reached its sixth edition, and is generally accepted by the profession as a competent exposition of the subject it deals with, it is too late to criticise it. All that a reviewer has then to do with is the Author's treatment of recent decisions. Mr. Goddard has been unfortunate as to these. There were two most important cases last year in the House of Lords—*McCartney v. Londonderry and Lough Swilly Railway Company* (L. R. [1904], A. C. 301), and *Colls v. Home and Colonial Stores* (L. R. [1904], A. C. 179). The former of these, though decided, had not been reported when the work left the Author's hands (see p. 393). This is the greater pity, since, as he says, there are very few cases as to the use riparian owners may make of water, and one of these few (*Earl of*

*Sandwich v. Great Northern Railway Company* (49 L. J., Ch. 225) is wrong, while Lord Macnaghten's judgment in *McCartney v. Londonderry and Lough Swilly Railway Company* (*supra*) most ably supplies the deficiency of authority on the point. As to *Colls v. Home and Colonial Stores* (*supra*), the Author has had time merely to note it without altering his previous text, which it proves inaccurate. Moreover, he seems to take an altogether mistaken view of that decision. He treats it as merely qualifying the previous rule of the Chancery Courts (see p. 382). As a matter of fact, it completely overturns that rule and re-establishes the old Common law doctrine as to the nature of an easement of light acquired by prescription. The Chancery Courts held that, as a matter of law, the dominant owner, in case of such an easement, is entitled to such access of light as he has enjoyed during the period of prescription. The House of Lords held that that is not the nature of his right at all. He is entitled, whatever access he may have previously enjoyed, to just as much as is in fact necessary under the circumstance for the reasonable use of his tenement. Another important recent decision—*International Tea Stores Company v. Hobbs* (L. R. [1903], 2 Ch. 165)—the Author neither discusses nor even adequately states: he simply refers to it in a footnote (p. 141), *Couper v. Laidler* (L. R. [1903], 2 Ch., 337), where the remarks of Buckley, J., as to what amounts to blackmailing were surely—whether right or wrong—entitled to notice, is also relegated to a footnote. Though we feel bound to make these comments, we of course recognise fully the great care and labour spent on this work, which will always be an authority on the law of easements.

**Seventh Edition.** *Pratt's Income Tax.* By JOSEPH H. REDMAN. London: Butterworth & Co. 1904.

Income Tax law is a very difficult subject to reduce within the limits of a small hand-book. An inquiry into the working of the Income Tax Acts, if it were effective, would probably reveal that the yellow paper sent round the country every year is wholly unintelligible to a vast number of the King's subjects: for even lawyers will not find it easy to understand. Something will undoubtedly be learnt by a perusal of the work before us: but in parts it might be usefully expanded. Take, for instance, the following passage:—  
 "A gratuitous allowance from the father to the son is not assessable"

on the son, the father having been charged, and he may deduct or lessen the allowance: but in considering the income of the son on a claim of exemption or allowance, it should be coupled with any income acquired by himself and considered part of his income, so that the allowance should be granted on the whole." Every part of this passage is suggestive of further questions. Is the first or the second reason given in the first sentence to be taken as the guiding one? Is it because the father has been charged or because he may deduct or lessen the allowance? Must both conditions be combined? Where do the proportions come from? and how may they be made good? These questions a lawyer can perhaps answer; but a layman cannot. Lawyers will have to dive more deeply than in the well before us for their law. The subject which we have selected for our example might have been discussed at length, and we also think that various illustrations—for very various cases arise—might have been given. But as many such cases are decided only *in foro conscientie*, the matter is of course a difficult one. There is no short cut to a knowledge of Income Tax law, and the subject does not lend itself easily to the compass of a hand-book, but Mr. Redman has evidently expended considerable labour in doing as much as he has done in this direction.

**Eleventh Edition.** *Lewin's Practical Treatise on the Law of Trusts.* By C. C. M. Dale. London: Sweet & Maxwell. 1904.

A work of immense research is this classic *Lewin on Trusts*. The cases upon this branch of the law of England are very numerous, and every year adds largely to their number. Take at random any page, and it is curious to note how slight are the variations of language which are continually calling for new decisions as to the construction of a trust. For instance, in the old cases in *Simon and Beavan*, decisions were given on each side of the line as to what is and what is not an implied trust for the maintenance of children, and the Editor has had, not only to add the recent cases down to 1904, but to catch the drift where possible of judicial tendencies. "The current of decisions," he says, "has of late years set against the doctrine of converting the devisee or legatee into a trustee: and although it would be an entire mistake to suppose that the old doctrine of precatory trusts is abolished, yet undoubtedly the Court now refuses to extend the doctrine, or to regard the mere use of

particular words, and will not imply a trust, unless it appears from the whole will that an obligation was intended to be imposed by the testator." "To enable him to maintain the children" falls on one side of the line: "For their own use and support of their children" falls on the other. A careful study of the present edition of this well-known work will greatly assist the reader to the underlying principle in all such cases.

**Sixteenth Edition.** *The Licensing Acts 1828 to 1904.* By the late JAMES PATERSON. This edition by WILLIAM W. MACKENZIE, M.A. London: Butterworth & Co. 1905.

**Third Edition.** *The Licensing Laws.* By R. M. MONTGOMERY, M.A. London: Sweet & Maxwell. 1905.

*A Guide to the Licensing Act 1904.* By ST. JOHN G. MICKLETHWAIT, M.A., B.C.L. London: Blackwood & Sons. 1905.

*The Licensing Act 1904.* By A. MONTAGUE BARLOW, LL.D., assisted by EDWYN BARCLAY. London: Jordan & Sons. 1905.

*The Licensing Act 1904, with Rules.* By CHARLES L. ROTHERA. London: Jordan & Sons. 1905.

The immense importance of the statute 4 Edw. VII, c. 23, made it certain that the law library would receive many additional volumes as the result of its passing into law. Five such volumes now lie before us; and we have not the slightest hesitation in saying that, in our opinion, Mr. Mackenzie's new edition of Paterson stands first in the order of value. The Author has carefully thought out the effect of every section in the new Act, and compared it with everything which he could think of which could possibly throw light upon its meaning, whether contained in earlier enactments or in decided cases of Courts of law. Take, for instance, his note "(m)," on pages 324 and 325. Every line of this note is pregnant with meaning and suggestion as to the effect of the words, "on the consideration by them in accordance with the Licensing Acts 1828 to 1902 of applications for the renewal." Every line of the note has a bearing on the practice of Licensing Justices under the new Act, on the limitation of their powers, on the right of those who come before them, and on the *sine quâ non* of a valid "reference" under the Act. In Mr. Rothera's work, on

the other hand, instead of endeavouring to elucidate the question as to what the Act means and what its effect is—a task more than sufficient for the space occupied by his volume—he wastes much of his powder in attacking the policy of the Act and telling us what he considers the defects of that policy—mere opinions which, be they right or be they wrong, are of no conceivable interest to anybody now that these provisions are the law of the land, and least of, all of any interest to the lawyer. For instance, there is an unnecessary passage as to the iniquity of depriving the Licensing Justices of the power of renewal in so many cases: and the Author entirely fails to see that the real power of the Justices is, when we leave words and come to facts, not practically diminished at all. They never had the final word in the matter: they still have the first word. It is true that the final word is not now called an “appeal,” but is a first trial exercised on a “reference.” But the Licensing Justices who “refer” have practically done just as much against the licensee as the Licensing Justices who “refused” under the old practice could do; and their proceedings are much more difficult to attack. Everybody who has been before Licensing Justices under the new Act will at once recognise that this is so. Again, the Author apparently fails to understand the principle of the compensation, which does not convert anything into a “permanent property” at all. A licensee under certain circumstances always had “a reasonable expectation that the future would resemble the past” as the books on logic say: the taxes were assessed on that assumption, and it was obviously a proper one: magistrates of a fanatical disposition had introduced such uncertainty into the matter that it was difficult to insure this particular risk: and Parliament therefore helped the licensee to insure himself at his own expense.

Messrs. Barlow and Barclay have a valuable note on section 1, and agree with *Paterson* that *Raven v. The Southampton Justices* (L. R. [1904], 1 K. B. 430) applies to Licensing Justices under the new Act.

Mr. Micklethwait's little “Guide” is very well done, and Mr. Montgomery's well-known book is adequately brought up to date, but is not perhaps so suggestive and illuminating in regard to the new Act as *Paterson*.

The rather curiously worded rules made by the Home Secretary are to be found in all the five books.



**Forty-second Edition.** *Every Man's Own Lawyer.* London : Crosby Lockwood & Son. 1905.

There was not a very great amount of legislation in 1904, so that the task of the Editor of this popular work is not so heavy as it sometimes is. Among the Acts which have been added is the Prevention of Cruelty to Children Act 1904, which has consolidated and amended the law on this subject. One important alteration in practice is noticed in an *erratum* ; namely, the extension of the limit of time for the prosecution of an offence, under sect. 5, sub-sect. (1), of the Criminal Law Amendment Act 1885, from three months to six. The other important Act of 1904 is the Licensing Act 1904, reference to which will be found on page 601. Some important Acts passed in 1903 will be found here, such as the Motor Car Act 1903 ; the Employment of Children Act 1903 ; and the Poor Prisoners' Defence Act 1903. No comment is made on this last piece of legislation. The information given is very accurate, considering how concise it is ; but we have noticed a few little slips. For instance, the minimum term of penal servitude is not less than three years, not "five years," in cases both of rape and setting fire to places of divine worship ; piracy with violence should be added to the list of capital offences. We think that a little more attention might be paid to Perjury.

## CONTEMPORARY FOREIGN LITERATURE.

*Justice Laudative.* By F. HOLBACH, Avocat à la Cour d'Appel de Bruxelles. Brussels and Paris, 1904.

Up to recent years the policy of the penal law has been vindictive rather than sympathetic. M. Holbach's work is a powerful appeal in favour of the *tendence laudative*, the securing of better obedience to the law by rewarding observance as well as by punishing breach, as is done in the Army and Navy. Did not Bentham say something of the kind a century ago ? And did not von Jhering picture justice as holding the balance even between reward and punishment ? Something of the same conception is to be found in the eloquent words of the Anglican liturgy, "not weighing our merits but pardoning our offences." The book is a striking one and gives food for

thought. It is an example of that sound work which long experience of reviewing leads one to expect from a Belgian jurist.

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*Das Bürgerliche Recht Englands.* Vol. I. Berlin, 1905.

This is an attempt at codification on the lines of the German Civil Code of the law of England by Mr. Edward Jenks and four Oxford law tutors. The commentary and apparently the translation is by Dr. Gustav Schirrmester. The idea is of great interest, and the draft code will, when completed, at least show the view of the law arrived at by the combined efforts of five English and one German jurist. This volume contains the code of Persons (35 sections), and of Things (up to § 42). As an example of the work may be cited § 7, one of the briefest.—“*Eine Ehefrau teilt den Wohnsitz des Ehemannes, selbst wenn sie tatsächlich getrennt von ihm lebt.*” One or two slight slips should be corrected. Lord Justice *Lopez* was no doubt a descendant of the *Lopez* family of Portugal, but he always spelled his name *Lopes*. The four Oxford tutors ought not to have committed themselves to the statement on p. 151 that a college fellow is a tutor of a college in a University.

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#### PERIODICALS.

In addition to the usual periodicals received, *Le Journal du Droit International Privé*, the *Zeitschrift für Internationales Privat—und Öffentliches Recht*, the *Deutsche Juristen-Zeitung*, and *La Giustizia Penale*, we have to welcome a new-comer in the *Revista de Direito*, the first number of which was published at Lisbon on the 10th January of this year. It appears three times every month, its contents being partly legal and partly economical. The *Law Magazine and Review* wishes it a successful career. There is a story from the English Courts at p. 68,—authority not given. Condensed it runs thus: Lady A., a professional beautiful (*sic*), visited a shop in London and purchased some music. On leaving she turned to the shopman and said she had forgotten something, to wit, “A kiss before I go” (*um beijo antes que me vá*). The man, though astonished, gave her a physical and not a paper kiss. The Court, says the writer, acquitted the shopman of assault, and recommended that authors and composers should choose less suggestive titles for their productions.

JAMES WILLIAMS.

## WORK OF REFERENCE.

*Debrett's House of Commons and the Judicial Bench, 1905.* London: Dean & Son.—The present edition of Debrett, forming as it does a complete Parliamentary Guide, should prove exceedingly useful in view of the possibility of a General Election in the near future. The information contained in the work is both full and reliable. The alterations rendered necessary as the result of recent bye-elections, and the many and important changes which have taken place on the Judicial Bench have been carefully noted, and revision of the contents has been carried down to the commencement of February, appointments, etc., of even later date being included in a list of "Occurrences during Printing." In addition to the biographical details of Members of Parliament and of the Judicial Bench, the work includes a condensed Peerage, explanation of technical Parliamentary expressions, a list of the public general Acts passed in 1904, and much other useful information.

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Books received, reviews of which have been held over owing to pressure on space:—Morris's *Pocket Law Lexicon*; Dayes's *Handy Book of Solicitors' Costs*; Gore Browne and Jordan's *Handy Book of Joint Stock Companies*; Keen's *Urban Police and Sanitary Legislation, 1904*; Hill's *Yearly Digest of Reported Cases*; Hastings' *Law Relating to Moneylenders*; Vinogradoff's *Growth of the Manor*; Roberts' *Inventors' Guide*; Mews' *Annual Digest*; Atkinson's *Jeremy Bentham: Life and Work*; Stone's *Justices' Manual*; Pratt and Mackenzie's *Law of Highways*; Barrington's *The Shop Hours Acts 1892—1904*; Ringwood's *Principles of Bankruptcy*; Summerhays and Toogood's *Precedents of Bills of Costs*; Martin's *Local Government Law in New Zealand*; Taylor's *Medical Jurisprudence*; Hayes and Jarman's *Law of Wills*; Maine's *Ancient Law*; *English Reports, Vols. XI.VIII—L.*

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Other publications received:—Ilbert's *Centenary of French Civil Code*; Whitney's *The Doctrine of Stare Decisis*; *Quarterly Noter-up, No. 5.*

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The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Review of Reviews, Juridical Review, Law Times, Law Journal, Justice of the Peace, Law Quarterly Review, Irish Law Times, Australian Law Times, Speaker, Canada Law Journal, Canada Law Times, Chicago Legal News, American Law Review, American Law Register, Harvard Law Review, Case and Comment, Green Bag, Madras Law Journal, Calcutta Weekly Notes, Law Notes, Law Students' Journal, Bombay Law Reporter, Medico-Legal Journal, Indian Review, Kathiawar Law Reports, The Lawyer (India), South African Law Journal.*

# THE LAW MAGAZINE AND REVIEW.

No. CCCXXXVII.—AUGUST, 1905.

## I.—THE BIBLE IN LAW.

EVER since the Christian faith became the recognised religion of the Roman Empire, the book which is the foundation of that faith has been used by judges and jurists, sometimes as an authority, sometimes as an illustration. The Old Testament contains two editions of the primitive code of the Hebrew race, and offers a field for comparison which was occupied very early in the *Lex Dei*.<sup>1</sup> Since then a mass of material has accumulated; the only difficulty is to keep any discussion of the matter within moderate bounds. What is suggested in this place, however incomplete, may be interesting.

It will be convenient to divide the subject into (1) the influence of the Bible in non-English systems, (2) its influence in England in (a) text-books, (β) decisions, (γ) statutes, (δ) Canon law.

(1) There are few allusions or quotations in the *Corpus Juris*, practically none, of course, in the *Digest*, as that is almost wholly the work of Pagan jurists. *Cod.* i, 1, *Cunctos Populos*, contains some quotations, and *Nov.* cxli, 1, has an allusion to the fate of Sodom. *Nov.* cxli asserts that the Old Testament foretells Christ, and puts a limit on the

<sup>1</sup> See *L. M. & R.*, Vol. XXX, p. 70.

freedom of interpretation allowed to Jews. When we come to Canon law the matter is quite otherwise. In a system founded on Scripture the bulk of passages cited or alluded to is enormous. The Canonists as well as the *Corpus Juris Canonici* afford numerous examples. Thus Peter of Blois, in his *Speculum Juris Canonici*, cites *Filius non portabit iniquitatem patris* and *anima quæ peccavit ipsa morietur*. In the *Corpus Juris* quotations grow fewer as contributions grow later; they are comparatively infrequent in the Sext, the Clementines, and the Extravagantes. Curiously enough in the list of the sources given in Richter's edition of the *Corpus Juris* (Leipsic, 1879), the Bible references are not included, though the glosses are. It is rare to find a text of Scripture forming a separate title, but Decretals v, 12, is Exod. xxi, 14, and v, 36, is Exod. xxi, 18, 19. Both moral and legal obligations are based on Scripture. In Decretum i, 42, pr., a priest must be hospitable, lest he be in the number of those to whom it will be said in the judgment, *Hospes eram et non suscepitis me*. The obligation of payment of tithe is proved especially by Mal. iii, 10, but the whole title of the Decretals (iii, 10), dealing with tithe contains a good deal of citation, especially of the Levitical law.

Certain texts appear often. Among these are Deut. xix, 15, or its equivalent, *Non unus stet contra alium, sed in ore duorum vel trium testium stet omne verbum*;<sup>1</sup> Matt. xvi, 19, *Quodcunque ligaveris super terram ligatum erit et in cælis*;<sup>2</sup> and Matt. xvi, 8, *Tu es Petrus, et super hanc petram ædificabo ecclesiam meam*.<sup>3</sup> Simony is condemned in the words of Isaiah xxxiii, 15, *Beatus qui excutit manus suas ab omni munere*, Decretals v, 3, 19. The case of Eli's sons is

<sup>1</sup> Decretals ii, 20, 4; iii, 26, 11, *et al.* See *Best on Evidence*, Sect. 597, who cites other texts.

<sup>2</sup> Sext. ii, 14, 2, which claims for the Pope the power of deposing the Emperor *ex legitimis causis*, a corollary of the doctrine of *translatio imperii*, Decretals i, 6, 34.

<sup>3</sup> Decretals i, 6, 4, *et al.*

referred to in v, 3, 31, and of course the classical instance of Simon Magus is not forgotten. In v, 3, he is coupled with Giezi (Gehazi). The taking of oaths by *religiosi* is proved by a great array of Old and New Testament authority in Decretals ii, 24, 26. The grounds of the resignation of a bishop, summarised in the mnemonic lines:

*Debilis, ignarus, male conscius, irregularis,  
Quem mala plebs odit, dans scandala, cedere possit,*

are supported by Innocent III with numerous citations, chiefly from St. Paul. In some cases the authority seems somewhat far fetched. Among other instances three suggest themselves. *Populus meus et populus tuus unum sunt*, 1 Kings xxii, 4, does not seem a very strong argument for the existence of the Trinity, to deny which is heresy, Decretals i, 1, 2. *Scribam eis multiplices leges meas*, Hos. viii, 12, is a far-fetched authority for the rubric of Decretals ii, 23, 9, *De præteritis præsumitur circa futura*. The prohibition of preaching by a layman is supported by Numb. xxii, the reproof of such preaching being of Balaam by his ass! In addition to actual texts of Scripture there are—even apart from the passages from decrees of Councils and from St. Augustin and other fathers—continual scriptural allusions and turns of phrase. Among these may be cited as examples: *jugum Christi imposuit*, Decretum ii, 2, 16, 27; *Dei timorem præ oculis non habentes*, ii, 23, 5, 26; *inimico homine superseminante zizaniam*, Decretals i, 6, 6; *timens ne litteras portaret Uriæ*, i, 29, 33; *gladius Salamonis*, ii, 11, 3; *fermento hæreticæ pravitatis corrumpere*, iii, 28, 14; *veluti summo angulari lapide solidantur*, Sext. i, 6, 17; *Pharaonis imitatus duritiam*, ii, 14, 2. That single combat existed in the Old Testament but not in the New is proved by what Decretum ii, 2, 5, 22, calls the solitary instance of David and Goliath. Bulls later than the *Corpus* often base their commands on Scripture; *Unam Sanctam* is full of quotations.

Secular bodies of law and writers cannot show such a

wealth of scriptural authority as Canon law. Still they contain a good deal. Spain is the most prolific, France containing little, unless in the vague piety of the introduction to the *Lex Salica*. Tholosanus, however, has arguments from the Bible, e. g., in the *Syntagma Juris Universi* (p. 549 of ed. of 1633), he brings forward Deut. xvi, and Amos v, in common with Cicero, as authorities for the duties of magistrates. Suarez, Sanchez, de Soto, and other Spanish jurists quote largely, sometimes in a rather curious way. Thus Suarez, *De Legibus* ix, 4, 28, uses John xiii, 34, *Mandatum novum do vobis ut diligatis invicem*, to explain the nature of a *mandatum*. The *Fuero Juzgo* cites St. Paul, *Tiempo será que los omnes non quieren buena doctrina*, etc., and *Que á los omnes que son limpios de fée todas las cosas les son limpias* (xii, 2, 2 and 8). In the Prologue to the *Siete Partidas* there is some biblical history, and there are a few citations in the laws themselves. There is one in i, 4, 14, *Fugum meum suave est et onus meum leve*. Others occur in i, 5, 30 and 31, and in later chapters. Scriptural phrases, such as *espada spiritual* (iv, prologue), are not uncommon. The Capitularies of Charlemagne, the Golden Bull, and other historic documents of Germany, will be found to contain many citations and allusions. Grotius is very fond of scriptural proofs and illustrations. Book ii, 13, 3, and ii, 20, 48, are especially prolific. Even the critics and commentators of Grotius seem to be affected with the same love of scriptural phraseology. Thus Dr. T. A. Walker says, "Even as in the valley full of bones, very many and very dry, Ezekiel saw the bones come together, bone to his bone, sinews of flesh come upon them and the skin cover them, and at the word of prophecy they lived and stood upon their feet, an exceeding great army, so we may see in the pages of *De Jure Belli et Pacis* the labours of jurists and theologians, etc."<sup>1</sup>

<sup>1</sup> *History of the Law of Nations*, Vol. I, p. 334 (1899).

(2) *England*.—(a) Text-books. The earliest seems to be the *Dialogus de Scaccario*. It contains both quotations and legal arguments. Among the former are the opening words, *ordinatis a Deo potestatibus in omni timore subjici similiter et obsequi necesse est, mors et vita in manibus linguæ and lingua modicum membrum est et magna exaltat*, both in i, 8, and several from the Psalms and Isaiah in ii, 2. In i, 8, the treasurer is said to be *velut alter Esdras bibliothecæ sedulus reparator*. Some of the legal arguments are very quaint. In i, 5, the conscience of the King is committed to the president of the Exchequer, for is it not written, *ubi est thesaurus tuus, ibi est et cor tuum*. In the same chapter the use of a third roll by Thomas Brunus is justified by the citation *funiculus triplex difficile solvitur*. In ii, 28, the *custos* does not receive any commission on his receipts, in spite of the Mosaic precept, *non alligabis os bovi trituranti*. Bracton, Britton, and Fleta contain little biblical allusion. One of the best-known instances is Bracton's phrase, *vir et uxor sunt quasi unica persona quia caro una et sanguis unus et unum corpus*, 371 b.<sup>1</sup> Fleta in his proem applies to the King the language of Ezekiel xvii, 3, *aquila grandis magnarum alarum*, &c. Of later works the *Mirror of Justices* in the preface has many scriptural allusions, and Kitchin, *Jurisdictions* (1657), bases his theory of law on two or three citations from the New Testament. St. Germain's *Doctor and Student*, c. 1, cites 1 Cor. ii, 11, *quæ sunt Dei nemo scit nisi Spiritus Dei*, and Prov. viii, 16, *per me reges regnant*.<sup>2</sup> In Fortescue, *De Laudibus Legum Angliæ*, there is a pronounced vein of manly piety, showing itself in frequent scriptural citations and

<sup>1</sup> He also has *mihi vindictam et ego retribuam*, 2a.

<sup>2</sup> It is worth noticing that in c. iii "John Gerson" is cited. This is probably the only citation of the *Imitatio Christi* in an English law book, unless perhaps Foster, J.'s, dictum in the *Case of Pressing*, 18 St. Tr. 1330 (1743): "Where two evils present, a wise administration, if there be room for an option, will chose the least." This is possibly a reminiscence of the *Imitatio*, iii, 12, 2, *de duobus malis minus est semper eligendum*. In St. Germain's days (about 1530) the *Imitatio* was generally attributed to one or other of the Gersons.



allusions. In c. i, the Chancellor bases his argument on both Job and Deuteronomy. The Prince answers in c. ii, that Moses was no doubt an adequate guide for a theocracy, but what he said will not satisfy laws of man's enactment. To this the Chancellor rejoins, in cc. iii—viii, that all laws are ordained of God, and enforces his argument by 2 Chfon. xix, 6, and several other texts, as well as by Anselm's *Cur Deus Homo*. In subsequent chapters citations are frequent, especially in c. xlii, a discussion of *partus sequitur ventrem*. In c. xlv occurs the quaint argument that laws exist potentially in the monarch as Eve did in Adam. Littleton, Selden,<sup>1</sup> and Hale rely comparatively little on Scripture. Coke, however, is rather more prolific, and only some of the places can be mentioned. In Co. Litt., 394b, he says of Littleton, "hercin our author followeth the example of Moses, who was a judge and the first writer of law, for he was *mitissimus omnium hominum qui fuerunt in terris*, as the holy history hath of him." In 2 Inst. 649, Luke xi, 42, is cited, and *id.*, 652, Deut. xiv, 22, both on the subject of tithe. In *id.*, 683, Lev. xviii is cited as the basis of the prohibited degrees in England. In *id.*, 508, occurs the strange story of the Jews at Quinborough.<sup>2</sup> The captain and crew of a vessel on which they had taken refuge conspired to destroy them. The captain took them for a walk and allowed them to be overtaken by the tide. When they appealed to him for help, "his wicked and prophane answer to them was, that they ought rather to cry unto Moses, by whose conduct their fathers passed through the Red Sea, &c." Blackstone is nothing if not scriptural. His theory as to the origin of property in the Introduction to bk. ii is supported by numerous verses of Genesis: i, 28; xiii, 8; xv, 3; xxi, 30; and xxvi, 15. In bk. vi, c. 1, Gen.

<sup>1</sup> One of the few instances is the discussion in the *Dissertatio ad Fletam*, ix, 3, where Acts xix, 35, is adduced to explain the meaning of town clerk.

<sup>2</sup> For the story Coke cites the Chronicle of Dunstable as his authority.

ix, 6, is cited, and in c. ii, Prov. vi, 30.<sup>1</sup> In the note to c. vii he suggests that the etymology of Lollards from *lolium*, Matt. xiii, 30, was devised at a later date in order to justify the burning of them. Quotations occur in modern text-books, especially those dealing with ecclesiastical law, but space will not allow of more extended reference. 1 *Taylor on Evidence*, 86, contains an examination of the incident of St. Paul and the viper at Melita.

(8) Decisions.—These are either of temporal or ecclesiastical Courts, and it will be well to deal with them separately. As to the former, there are a few references in the Year Books, and they come down to quite modern times. This is only what might have been expected in a country where it has so often been held that Christianity is a part of the Common law.<sup>2</sup> In the Year Books the most frequent use of a biblical term is the "Adam," which represents the "J. S." of a later period. In one case (21 Edw. I, 392), a case of mortdancester is reported in which both Adam and Eve are parties. In subsequent reports a good deal of citation and allusion is to be found, especially in the earlier State Trials. See the trials of Cranmer, Campion, and the Queen of Scots, in Vol. I. In the last trial, at p. 1198, the Lord Chancellor commits himself to a statement of opinion which is perhaps less wise than his model. "How wisely proceeded Solomon to punishment, in putting to death his own natural and elder brother Adonias, for the only intention of a marriage which gave suspicion of treason!" In 2 St. Tr. 15, Sir Walter Raleigh says, alluding to the Canonist doctrine, *unus testis nullus testis*, already mentioned,

<sup>1</sup> This is considerably more detailed than the corresponding passage of Bracton, 4a, who simply refers vaguely to the Old Testament in general as determining what is *meum* and *tuum*.

<sup>2</sup> The earliest assertion of this principle seems to be by Prisot, C.J., in a case of *Bohun v. Bishop of Lincoln*, Year Book, 34 Hen. VI, 9, *Scripture est commun ley sur quel tous manières de leis sont fondés*. It appears in numerous other text-books and decisions down to *Reg. v. Foote*, 15 Cox, C. C. 235 (1883).

"It is also commanded by the Scripture, *allocutus est Jehovah Moſea, in ore duorum aut trium testium, &c.*" At p. 18 the accused also states, "The wisdom of the Law of God is absolute and perfect, *Hæc, fac ut vives, &c.*" In the Gunpowder Plot trial, 2 St. Tr. 190, the Earl of Northampton says, one of the names sounding strangely to modern ears, "Where one doth hold of Cephas, another of Apollo, openly dissension ensues."

*Sharington v. Strotton* (Plow. 278 [1564]), is one of the earliest ordinary cases after the Year Books. Bromley, *arguendo*, urged, among other arguments, that when God had first created man and woman and living creatures, he said to them, "Increase and multiply." 1 Chr. xxi, 21, is also cited. In *Aldred's Case* (9 Rep. 58 b), Wray, C. J., in order to show that a prospect or view is an amenity and not a right, quoted Eccl. xi, 7, *dulce lumen est et delectabile oculis videre solem*. In the *Earl of Clanrickarde's Case* (Hob. 277 [1614]), Hobart, C. J., observes that the word *astuti* is used in the Proverbs of Solomon in a good sense when it is to a good end. In another case, *Pits v. James*, in the same year (Hob. 125), the same judge quotes Matt. xxiii, 11, correctly, but is a little—perhaps intentionally—inaccurate in his rendering of xxv, 40, which he puts thus, "Inasmuch as you did feed, clothe, lodge the poor, you did it unto me." He also cites Heb. i, 7, incorrectly. The trial of the legality of ship-money in 1637 supplies two cases. In 3 St. Tr. 1217, Finch, C. J., says, "We will speak our consciences, since we well know shortly, as the Psalmist says, Corruption shall say, I am thy father, and the worm, I am thy mother." At p. 1232, the same judge makes an allusion to the railing of Shimei, 2 Sam. xvi, 5. The practice of the Garden of Eden is referred to more than once as a kind of common form. *Callis on Sewers* (250 [1685]), suggests that in the first commission ever granted (Gen. i, 28), by virtue of the word *dominamini* in the plural,

God coupled the women in the commission with man. In one of the Bentley cases, *R. v. Cambridge University* (1 Str. 566 [1723]), Fortescue, J., said "that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam (says God), where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also." In his defence of himself, in *Wilkes' Case* (19 St. Tr. 1112), Lord Mansfield uses 1 Peter ii, 17, with powerful effect, "I honour the King and respect the people, &c." Other uses of Scripture by the same great judge will be found in *Archbishop of Canterbury v. House*, Lofft, 622. "Thou shalt not seethe a kid in his mother's milk," and in 1779, in the well-known case of *Wigglesworth v. Dallison* (Doug. 201), "He who sows ought to reap," probably a quotation from memory of Gal. vi, 7. Coming to the nineteenth century, in *Shore v. Wilson* (9 C. & F. 355 [1842]), extracts from *Bowles' Catechism* are set out, with Scripture proofs of the extracts. In *Reg. v. Hicklin* (L. R. 3 Q. B. 372 [1868]), Cockburn, C.J., cites Rom. iii, 8, and asserts that it is applicable in law as well as in morals. The Judicial Committee had, in 1894, to consider the question whether the word "Ananias," applied to the plaintiff's newspaper, necessarily imputed wilful and deliberate falsehood (*Australian Newspaper Co. v. Bennett* (L. R. [1894], A. C. 284).

In the ecclesiastical decisions scriptural allusions are frequent. They are to be found in several of Lord Stowell's decisions; see especially *Lindo v. Belisario* (1 Consist. 216 [1795]), a long discussion of the Mosaic law of marriage. "One Lord, one faith, one baptism," Eph. iv, 5, occurs in the judgment in *Mastin v. Escott* (2 Curteis, 692 [1841]). Several of Sir R. Phillimore's judgments contain arguments and illustrations from texts of Scripture, e.g., *Martin v. Mackonochie* (L. R., 2 A. & E. 167); *Sheppard v. Bennett* (L. R.,

3 A. & E. 167); *Boyd v. Philpotts* (L. R., 4 A. & E. 297). Quite recently, in *Rector of St. Luke's Chelsea v. Wheeler* (L. R. [1904], P. 268), Dr. Tristram, in his judgment, cited Ex. xxxvi, 7, as to the meaning of "stuff," and xxxv, 20—28, as to the materials used in the construction of the Tabernacle. The largest amount of quotation, perhaps, is to be found in *Gorham v. Bishop of Exeter* (Moore's Special Rep. [1852]). A reference to the report *passim* will afford very numerous examples.

(γ) Statute law does not offer much field for investigation. Alfred's dooms begin with the ten commandments, though not in biblical order, the second commandment coming last. In the proem to the laws of Athelstan the duty of payment of tithe is based on biblical grounds. In the laws of Knut, curiously enough, the only citation of Scripture is in the secular and not in the church dooms. Judges are exhorted to remember mercy when they pray *et dimitte nobis debita nostra sicut et nos dimittimus*. Edward the Confessor quotes the Psalms and St. Augustin. In the same century Howel Dda acknowledges the Scriptures by summoning clerks to the White House on the Taff, lest the laity should ordain anything contrary to Holy Scripture.<sup>1</sup> Coming down to much later times, 34 & 35 Hen. VIII, c. 1, forbade the use of English translations of the Bible, the reading of the Bible in Church, and the private reading by women or artificers, husbandmen, and persons of the artisan class without the King's licence. 1 Edw. VI, c. 1, s. 1, set forth the words of communion at the Sacrament and cited the language of St. Paul as to unworthy reception, 1 Cor. xi, 26; 1 Mary, sess. 2, c. 1, s. 4, asserts that Thomas Cranmer, "taking his

<sup>1</sup> Scriptural allusions are frequent in the charters, e. g., in that of Offa, *omnibus patet fidelibus quod hic non habemus manentem civitatem juxta gloriosi doctoris gentium Pauli vocem* (Earle, *Land Charters*, 308). Later in the charter Offa alludes, as so often occurs, to Ananias and Sapphira. Another charter in which they are brought forward as examples is one of Leofing in 1042 (Sweet, *Anglo-Saxon Reader*, pt. ii, No. 40).

foundation partly upon his own unadvised judgment of the Scriptures," gave sentence touching Henry VIII's marriage. The Book of Common Prayer was annexed to the Act of Uniformity of 1662, 13 & 14 Car. II, c. 4. By 2 & 3 Will. III, c. 35, it is an offence for a person educated in the Christian religion to deny the Holy Scripture of the Old and New Testaments to be of divine authority. The Schedule to the Act of Uniformity Amendment Act, 1872 (35 & 36 Vict., c. 35), sets out several passages from the Bible, *e.g.*, the Lord's Prayer and the Benedictus.

(b) English Canon law may be said to begin before the Conquest. A reference to the Anglo-Saxon laws will show that there is a considerable body of citation and allusion in the Confessional and the Penitential of Egbert, Archbishop of York, and in the Canons of King Edgar (*Ancient Laws of England*, ed. 1840, p. 344, etc.). Both the provincial and legatine constitutions of a later date are full of them. Thus Lyndwood begins with a constitution of Archbishop Peckham, over which biblical turns of phrase are sown with a free hand. There are several similar constitutions later, *e.g.*, iii, 16, but few direct quotations. The Decalogue is quoted as determining the duties of an archpriest, i, ii (p. 54 of Oxford edition, 1679). The legatine constitutions of Otho and Othobon are of the same nature, allusive rather than containing direct extracts. Thus Otho says of baptism, *Quem omnium sacramentorum januam Salvator noster instituit*. Othobon directly cites Acts viii, 1 (ed. 1679, p. 117). At a later date Ayliffe, *Parergon*, cites 1 Tim. vi, 2, and 2 Pet. ii, 1, as to the meaning of heresy (ed. 1726, p. 288).

It is perhaps hardly necessary to mention the use of the Gospels (or the Old Testament in the case of a Jew), as the sanction of an oath in Courts of Justice and in qualifying for certain offices. This dates as far back as the Code of Justinian, in which the oath, as now, had to be taken *corporaliter*,<sup>1</sup> that is, by at least touching the Book. Roman

<sup>1</sup> The word is twice used in the *Corpus Juris*, *Cod.* ii, 28, 2, and 43, 3.

law went further than English by providing that in some cases the Book should be deposited *ante sedem judicalem* during the whole proceedings.<sup>1</sup> Of decisions on the matter, *A.-G. v. Bradlaugh* (14 Q. B. D. 667 [1885]), is perhaps the most interesting. There the defendant had brought a New Testament to the House of Commons in his pocket, but the oath was held not duly taken, partly because it was not administered by the proper authority.<sup>2</sup>

*Scotland.*—Scriptural illustrations occur in several of the monuments of the older law. Thus Assise Regis David, c. 31, cites *non habebis in sacculo tuo diversa pondera maius et minus*. In later law, the Confession of Faith Act, c. 1, cites at the head of the Act Matt. xxiv, 14, "And this glad tydingis of the kingdome salbe preichit throwch the haill wirlde for a witnes unto all natiouns," 1567, c. 4, s. 25, is curious. It enacts that the kings before coronation shall promise to set forth the true religion of Jesus Christ, even as they are obliged by the law of God, in Deuteronomy and in the eleventh chapter of the Second Book of the Kings. The biblical flavour of many of the Scottish statutes is not surprising, when the Estates could enact that householders worth 300 marks yearly should possess a Bible and a psalm book under a penalty of £10 (1579, c. 10).<sup>3</sup> The Bible is frequently used in legal text-books, especially in Stair's *Institutes*. The author says, in i, 1, 4, that one part of natural law "is called the light or law of reason, and is called by Solomon the candle of the Lord searching the inward parts" (Prov. xx, 27). The most

<sup>1</sup> *Cod.*, iii, 1, 14.

<sup>2</sup> See Shakespeare, *Henry VI*, pt. iii, Act i, Sc. 2 :

"An oath is of no moment, being not took  
Before a true and lawful magistrate  
That hath authority over him that swears."

<sup>3</sup> In England, by the statute of Henry VIII (*supra*), the reading of the Bible by the comparatively wealthy seems to have been regarded as a privilege, in Scotland as a duty.

modern case in which the Bible has been used is the *Free Church Case* in 1904, but perhaps, considering the nature of the case, to a smaller extent than might have been expected. Counsel for the respondents cited in argument eight passages of the New Testament (p. 605 of the Report), but no direct scriptural allusion was made in any of the judgments in the House of Lords, *Free Church of Scotland v. Lord Overtoun* (L. R. [1904], A. C. 515).

*Ireland.*—The introduction to the *Senchus Mór* is full of pious assertions and comparisons, but there is no actual citation of Scripture either in the introduction or in the laws. Nor does the statute roll of Ireland afford any material. A few cases do; Joy, C.B., in 1836, being the most prolific among the Irish judges in his display of biblical learning. Pilate's "What is truth?" and another passage from the same Gospel, was cited in *Dill v. Watson* (2 Jones, 90), and the question whether the phrase "seeking whom he might devour" was libellous was answered in the affirmative in *Crotty v. McMahon* (465). In *Reg. v. O'Connell* (5 St. Tr., N. S., 703), Crampton, J., said, "Let us never forget the Christian maxim, 'that we should not do evil that good may come of it,'" a somewhat loose rendering of Rom. iii, 8.

*Apocrypha.*—It may be interesting to group separately some of the numerous allusions to the Apocrypha. Two occur as early as the *Quadripartitus*. In the *Dedicatio* is found *qui venundati sunt et maleficient*, 1 Macc. i, 16, and in the body of the work, *superbia principium iræ Dei*, Eccl. x, 13, not quite correctly cited, the *Dei* being probably inserted from the previous verse. The *Corpus Juris Canonici* is prolific, especially in reference to the Books of the Maccabees. The murder of the idolatrous Jew by Mattathias, 1 Macc. ii, 24, is alluded to in *Decretum* ii, 23, 5, 32, and the oath of the Romans to the Jews, *Decretum* ii, 22, 1, 16,



the point being that the oath, though taken by false gods, must be kept. The Maccabees are also cited in a rather unexpected place as fighting on the Sabbath, Decretals v, 41, 4, *De Regulis Juris*. Ecclesiasticus is cited in at least four places. One of the authorities for not condemning an accused unheard is *prius quam audias ne judicaveris quemquam*, Eccl. xi, 7, Decretum ii, 15, 8, 5. Decretals ii, 24, 26, incorporates Eccl. xxiii, 11, *vir multum jurans replebitur iniquitate et non discedet a domo ejus plaga*. The Clementine Constitutions open title *De Verborum Significatione* with Eccl. xxiv, 31, *dixi, rigabo hortulum plantationum*. John XXII, in the *Extravagantes Communes*, condemning *lasciva melodia* in churches, quotes Eccl. xlvii, 10, *nam in ore eorum dulcis resonabat sonus*. The only citation which has come to the writer's knowledge in an English text-book is Wisdom xiii, 1, *vani sunt omnes in quibus non subest scientia Dei*. Grotius quotes the Maccabees twice, 1 Macc. vii, 18, and 2 Macc. viii, 32, both in ii, 14, 6. Three English cases are to be found. In Sir Walter Raleigh's trial, 2 St. Tr. 19, the history of Susanna, as to the dangers of concocted evidence, is alluded to by the accused. *Brecks v. Wolfrey* (1 Curteis, 880 [1838]), is an interesting case. The question was the legality of an epitaph concluding with the words from 2 Macc. xii, 46 (Douay version), "It is a holy and wholesome thought to pray for the dead." Sir H. Jenner Fust held that prayer for the dead is not prohibited by the doctrine of the Church of England. The well-known verse in 1 Esdras iv, 41, "Great is truth and mighty above all things,"—perhaps the original form of *magna est veritas et prævalebit*—is probably hinted at in the words of a judgment of Erle, C.J., in 1862, "The interests of truth and justice must be allowed to prevail," *Bartlett v. Lewis* (12 C. B., N. S., 249). A more minute research would probably result in the discovery of other instances.

JAMES WILLIAMS.

## II.—THE HOME OFFICE AND CRIMINAL APPEALS.

SINCE the Beck Commission we have had a defence of the Home Office from the pen of Sir Godfrey Lushington, and so far back as September, 1899, a similar defence appeared in the *Fortnightly Review* in an article signed "X. Y. Z." Were the only object to defend the officials I should not be disposed to quarrel with these articles. It is not for subordinate officials to reform an effete and inefficient system. They have probably precedent to refer to in support of everything that they do, and if adherence to routine and precedent gives less trouble to the official and throws less responsibility on him than would be done by a new departure, it is hard to blame him for sticking to them like a limpet to the rock. But if frequent and serious miscarriages of justice remain uncorrected, without any neglect or misconduct on the part of the officials, this very fact places the defects of the tribunal in the strongest light. If the officials do their utmost to correct miscarriages and fail—as they undoubtedly failed in the case of the first conviction of Beck, whether they did their utmost or not—what conclusion can we draw, except that the defects of the tribunal are such as no vigilance on the part of the officials can remedy? I confess that I think the strictures of the Beck Commission on "C. M." were unwarranted. He distinctly pointed out to his superior that the question, whether Beck was Smith, was one to which the counsel on both sides attached the utmost importance—the defence leaving no means unexhausted of trying to get in evidence of non-identity, while the prosecutors did their very utmost to keep it out. I would have thought that any man of ordinary capacity would have drawn the inference that counsel on both sides thought that the verdict would probably depend on whether this evidence were admitted or rejected, and

that a Home Office official who was not bound by the legal rules of evidence (this, I think, is admitted on all hands) would therefore pay the greatest attention to the evidence to which both sides attached such extreme importance. If a non-legal official writes, "Counsel on both sides attached enormous importance to this point, but I don't think there is anything in it," what conclusion ought a superior officer with legal training to have drawn?

But when the small number of miscarriages detected and remedied by the Home Office is relied on as proving that the total number of miscarriages is small, and that therefore no legal Criminal Appellate Court is needed; and when Sir Godfrey Lushington contends that the failure of the Home Office to redress the miscarriage on the first trial of Beck was owing to very unusual circumstances, and does not at all imply that the great majority of such miscarriages are not at present corrected, it becomes necessary to inquire into the efficiency of the Home Office as a rectifier of miscarriages of justice, irrespective of the question whether the subordinate officials are or are not responsible for the defects that exist. And I think both Sir Godfrey Lushington and "X. Y. Z." (if they are really distinct persons) have on this point put forward two inconsistent defences, namely, (1) the Home Office from its structure and its functions cannot be expected to redress all miscarriages of justice; and (2) with a few exceptions of a very special character, it does in fact rectify them all. The first of these defences is an argument in favour of a Court of Criminal Appeal. The second is an argument against it. (In speaking of a Court of Criminal Appeal I hope I will not be understood as maintaining that criminal appeals might not be advantageously heard by existing legal tribunals.)

Let me then inquire whether there was anything of so special a character in the first trial of Beck as to account for the refusal to liberate him by a tribunal which was in

ordinary cases efficient? No doubt it was unusual that a man should have been convicted nineteen years before of a precisely similar series of frauds, not repeated during the interval; and no blame would have attached to any one if this previous series of frauds had been overlooked. But it was not overlooked. It was known and tendered in evidence at the trial, but rejected (as the Commission held erroneously) by the judge. Moreover, the Crown had originally intended to prove the identity of Smith and Beck at the trial, and had not only got a witness named Spurrell to swear to their identity, but had got Mr. Gurrin to report that the documents written on both occasions were in the same handwriting. It must have been a considerable come-down to the prosecutors when they ultimately found that instead of proving the identity of Beck and Smith, they had to do their utmost to exclude evidence as to their non-identity. But the Home Office has never held itself bound by the legal rules of evidence. It admittedly receives secret and confidential reports from chief constables and other officials, every word of which would perhaps be disputed if the prisoner or his advocates had any means of discovering what they contained. Assuming the infallibility of Sir Forrest Fulton on the question of legal evidence, his decision on that point should have had no bearing on the question before the Home Secretary, who acts on different rules as regards the admission of evidence. Why then, when evidence which the Commission regarded as conclusive was tendered to the Home Office, did it prove wholly ineffectual? It did not even induce the officials to institute a serious inquiry.

But this is not all. Leave Smith and the earlier frauds out of account altogether. We have then a series of fifteen or sixteen frauds in the years 1894 and 1895, precisely similar in character, and presumably committed by the same person. The prisoner was accused of committing ten of these. Not

a word was said about the other five or six. The Crown did not call the women who were defrauded in these omitted cases. The prisoner, it is stated, could not do so because the police, to whom they had reported the outrages, refused to give their names and addresses to the solicitors employed for the defence. When ten women were placed successively in the witness-box, and each of them identified the prisoner as the man who had defrauded them under precisely similar circumstances—their evidence being corroborated by Mr. Gurrin's opinion as to the handwriting—the unanimity of the witnesses naturally impressed both judge and jury. But the unanimity was only apparent. The defrauded persons seemed to be all agreed because the dissentients were not produced. The judge and jury may well be excused. But surely the Home Office officials must have known the real facts when they decided on nilling Beck's petition. They must have known that the defrauded women, instead of being unanimous were divided, ten to five, on the question of identity. If the ten were right he was guilty. If the five were right he was innocent. I think most persons outside of the Home Office will think that where an identity is only proved by ten witnesses against five, there are quite sufficient grounds for a reasonable doubt. Nor should any stress be laid on the finding of a jury who had only two-thirds of the relevant facts before them. They would very probably have acquitted the prisoner if they had heard the remaining third. Respect for the verdict of the jury is entirely misplaced in a case where there is important evidence which the jury did not hear. How can we know what verdict the jury would have returned if this evidence had been given at the trial? Why should we assume that they would have returned the same verdict, and then proceed to consider the question whether, *if they had done so*, the verdict would have been manifestly wrong? The natural assumption is, that if the evidence had

been given at the same trial the jury would have returned the same verdict that an unprejudiced official would return, if the question had now come before him as a new one. There is no presumption whatever that the jury would have returned the same verdict if the evidence had been materially different. Undoubtedly there were unusual circumstances in the *Beck Case* which I think form quite a sufficient defence for the judge and jury. But was not every one of these unusual circumstances known at the Home Office when the prisoner's petition was nilled by the officials? The state of things might have occurred but once in a thousand cases, but how does this excuse officials who knew that it had occurred, but continued to act as if they were entirely ignorant of it? The unexpected often happens, but it is not considered a sufficient excuse for the official concerned to say, "I did nothing because I did not expect it." One thing, however, which neither the Commission nor Sir Godfrey Lushington cleared up, is this. It was admitted that for a long time the Home Office officials persisted in the belief that Beck was Smith. How did that belief *originate*? All the charges which involved the assertion of identity were dropped at the trial. The Crown had to struggle hard to exclude evidence of non-identity. Yet we here find the officials persisting for a long time in a belief to the disadvantage of the prisoner, for which, so far as I can find, there never was a particle of evidence in their possession. If they weigh evidence carefully, instead of jumping to a hasty conclusion, how can Sir Godfrey Lushington explain this belief which they undoubtedly entertained? Were the grounds of this belief to be found in some secret and confidential report that was not worth the paper it was written on? Again, let me point out that the ten women who identified Beck as the man who defrauded them were not speaking of the same crime but of different crimes—a point on which

Sir Godfrey actually lays stress, as if it strengthened the case against the prisoner. As regards any single crime out of the ten with which he was charged the evidence consisted of the evidence of one woman corroborated by that of Mr. Gurrin. The evidence of the second, third, fourth, &c., woman did not corroborate that of the first woman in any respect, unless the several different offences were so similar in character as to point to a common author. The weight of this kind of corroboration evidently depends on whether the entire series of offences which appear to have been the work of a common author could or not reasonably be ascribed to the prisoner. Nothing turned on the mere number of witnesses. The important matters were, what proportion of the entire series appeared to be brought home to him, and what explanation could be given of why the others could not be brought home. Sir Godfrey would, I presume, admit that if there had been a hundred similar outrages, and only ten of the victims identified Beck, the case against him would have been a weak one. It might have appeared strong to the judge and jury, if the other ninety had been kept back at the trial, but the officials at the Home Office would have been better informed on this subject. And if these officials act on the principle that ten witnesses, each of whom swears to a different offence, corroborate each other just as strongly as if they were all swearing to the same offence, they can hardly fail to go astray in almost every case which involves a series of offences—which occurred, for example, in the cases of Forbes and Edalji as well as in that of Beck, and to a considerable extent in the previous case of Bynoe.

Finally, Sir Godfrey, after exaggerating the weight of the two kinds of evidence—that of ten women swearing to Beck as the man who had defrauded them in a similar manner, and that of Mr. Gurrin as to handwriting—says, “Neither the one kind of evidence nor the other had anything to do

with Smith." At the trial it had not, because (by what the Commission declared to be an error on the part of the judge) everything relating to Smith was excluded from the evidence. But this defence is wholly inapplicable to the Home Office. The officials were aware when they decided against Beck that he was not Smith: that he was sufficiently like Smith for the witness Spurrell to have identified him as Smith before the magistrates, and for the Crown counsel and solicitors to have prepared a number of indictments against him in which his identity with Smith was asserted: that Mr. Gurrin had declared documents, admittedly in the handwriting of Smith, to be in the same handwriting as those written in connexion with the frauds of which Beck had been convicted: and that five or six out of fifteen or sixteen defrauded women did not concur in the identification of Beck as the man who had defrauded them. That the likeness between Beck and Smith which had deceived Spurrell should have deceived ten or fifteen of the defrauded women was not a very startling supposition, and if Mr. Gurrin's evidence did not now actually tend to exculpate the prisoner, the fact that he had also declared the incriminating documents to have been in the handwriting of a totally different person named Smith, deprived his evidence against Beck of any possible value. Further, if the officials had examined the details of the frauds of which Smith had been convicted, the similarity between them and those of which Beck had been convicted was so close, down to the minutest detail, that it was almost impossible for a rational man to ascribe them to two distinct offenders. The judge (except as regards the erroneous exclusion of evidence) and the jury need no defence. The case before them seemed overwhelming, and would have been really overwhelming if nothing of importance had been kept back. But how does the fact that the case made at the trial appeared to be perfectly conclusive, afford any defence to a revising tribunal



which persisted in upholding the verdict and sentence after almost every part of this seemingly conclusive case had been shattered to the very foundation? Defenders of the Home Office have avowed—and Sir Godfrey seems to agree with them—that the Home Office practically never interferes with the verdict of a jury without new evidence. At all events it never does so, unless the judge strongly dissents from the verdict. How, then, is the Home Office concerned with the question whether the evidence at the trial appeared to be conclusive or otherwise? Nothing but new evidence could set the Home Office in motion. Without that the officials would have taken no action, whether the evidence at the trial had been weak or strong. Their function was to consider the evidence, new and old, taken as a whole, and to draw the proper conclusion from it. But if they had fairly considered the whole evidence before them in the case of Beck, how could they have arrived at the conclusion that there was no reasonable doubt as to the man's guilt? The question was not one that involved any deep knowledge of law. They had merely to act as impartial jurors. The original jury was probably right; but what is to be said for the verdict of the Home Office jury?

That a revising tribunal will not correct a perverse verdict—and perverse verdicts have sometimes been given in criminal as well as civil cases—without new evidence is perhaps sufficient to prove its inefficiency. There is one class of miscarriages of justice which it does not even seek to remedy. But the Home Office has many other defects. One ground for defending its action is, that its function is not to administer justice but to dispense mercy, and that, therefore, it could not be blamed for adopting different rules for interfering with a sentence from those adopted by a Court of justice. If it were only meant that the Home Secretary sometimes extended mercy to prisoners whose

claims would not be entertained by a Court of justice—on the ground of ill-health, for instance—no fault could be found with this principle. But it seems clear that the Home Secretary sometimes refuses to grant mercy in a case where a Court of justice would feel bound to interfere. This is stated expressly by “X. Y. Z.,” and is, I think, practically admitted by Sir Godfrey Lushington. At all events, the latter says: “The Home Secretary is not a Court of Appeal and does not retry any case: . . . . He is the dispenser of the Royal Prerogative of Mercy.” This would alone suffice to satisfy most persons that a tribunal that is not intended to be a Court of Appeal cannot discharge the duties of such a Court in a satisfactory manner. But to proceed. The next thing Sir Godfrey tells us, is that, when questions of doubt are raised, the Home Secretary always consults the judge who tried the case (unless the matter is thought too trivial to refer to him), and “when he receives the opinion of the judge he acts upon it, if it relates to a point of law always; if it concerns a question of fact almost always.” Now, what can be more absurd than to draw this marked distinction between the administration of justice and the dispensing of mercy, and then to throw the whole decision of the question at issue into the hands of the judge who tried the case? How has the judge proved his qualifications to act as a dispenser of mercy? Imagine Sir John Day in that position, as he must have frequently been under such a system! True, the Home Office is not a Court of Appeal in the ordinary sense. The only real appeal is from the trial-judge ill-informed to the trial-judge better-informed. But is not such an appeal as this as objectionable in the dispensation of mercy as in the administration of justice? Let us grant that the officials have studied with great care the manner in which mercy ought to be dispensed. Of what use is their knowledge on the subject, when the ultimate decision as to the granting

or withholding of mercy is left to the presiding judge? And I presume the rule is not confined to trials before a judge of the Supreme Court, but extends to a Quarter Sessions like that at which Edalji was convicted (where the chairman was not a member of either of the legal professions), and perhaps, even to an appeal against a conviction by a magistrate at Petty Sessions. The sole duty of the officials seems to be to prevent the judge who presided at the trial from being troubled with frivolous petitions. They decide which are to be stopped and which sent forward. The judge is the ultimate arbiter of the prisoner's fate. There are very few instances of miscarriages of justice in which the judge did not sum up strongly against the prisoner, and of this the officials were no doubt aware. A judge who takes a strong view at the trial is usually slow to alter it. Almost any other judge would form a better appellate tribunal, though no appellate tribunal consisting of a single judge could be regarded as satisfactory. The appeal from the trial-judge ill-informed to the trial-judge better-informed is about the most unsatisfactory kind of appeal that could be invented, but I presume that the judge in hearing the appeal is governed by considerations of justice, not of mercy, and that, therefore, the distinction between justice and mercy, on which so much stress is laid by the advocates of the Home Office, is completely nullified by the practice of allowing the judge who presided at the trial to decide whether the sentence is to be carried out or commuted.

Some further facts, however, have recently been elicited, which are well worthy of attention. A free pardon—now usually accompanied by compensation—is only given where innocence is proved. Where the prisoner merely establishes a reasonable doubt as to his guilt, the only mercy accorded to him is a remission of the remainder of his sentence without repaying even the expenses incurred in establishing the

doubt. This, I need hardly say, is a course which no Court of Appeal would sanction. To meet a proof of reasonable doubt by a shortening of the sentence, leaving the conviction and the many inconveniences resulting from it untouched, may be mercy, but is not justice. But the distinction involves several important questions. What is proof of innocence? What is reasonable doubt? What doubts are not sufficiently grave to warrant any intervention? Can the decision of such questions as these be referred to the dispensing of mercy instead of the administering of justice? If a dispenser of mercy has to decide questions of fact of the same kind that are decided in criminal cases by a judge and jury, and in the Chancery Division by a judge alone, surely the dispenser ought to be a person competent to decide them, and to do so on rational grounds which he need not hesitate to state publicly. But the attempt to carry out this distinction between justice and mercy breaks down on every side when applied to miscarriages of justice, real or alleged. The prisoner asks for justice not mercy. The reply is, "I am not administering justice but dispensing mercy." Then says the prisoner, "I ask for mercy." "No," replies the official, "you have not sufficiently established your innocence or the doubtfulness of your guilt to satisfy me that your claim is a just one." It is time that this ringing of changes between justice and mercy were finally laid aside.

The distinction between the treatment of prisoners in cases of proved innocence and of doubtful guilt has been established but recently. In the once-famous case of Dr. Smethurst the prisoner was granted a free pardon, on a report from Sir Benjamin Brodie, that "though the case was full of suspicion against Smethurst there was not complete and absolute proof of his guilt." In the later case of Mr. John Hay, under Sir William Harcourt, the prisoner received a free pardon, but was refused compensation on the

ground that he was only getting the benefit of a doubt. In the case of John Kelsall, under Mr. Asquith, the remission of the remainder of the sentence was such a novelty that the Governor of the convict prison gave him a certificate that he had received a free pardon, which the Home Secretary afterwards stated in the House of Commons was an error on the Governor's part. But it appears that in the last 19 cases there were only 4 free pardons against 15 remissions of the remainder of the sentence without any compensation or payment of expenses. Croucher, who seems to have been undoubtedly a victim of mistaken identity, was released with five and fivepence in his pocket and an unpardoned conviction standing against him. He had served out more than half his sentence. The ordinary rule seems to be to recognise no more than a reasonable doubt. Innocence is now only admitted in very rare cases. I may refer, in connection with this subject, to the case of John Kelsall already alluded to. He was convicted of the manslaughter of his wife by throwing a paraffin lamp at her and sentenced to 14 years' penal servitude, of which he actually served nearly three years, which a more considerate judge might have deemed amply sufficient to expiate his crime if clearly proved. The evidence showed that his wife and her sister, Mrs. Curran, entertained two female neighbours and had some drink with them on the evening in question, while Kelsall was in a different part of Pendleton. Up to the time that the two visitors left, Kelsall had not returned. A few minutes after they left, cries were heard from the house, and the door, being found locked, was forced open. Mrs. Kelsall was lying dead with her clothes on fire. Mrs. Curran was lying on the floor almost insensible, and some of the articles in the room were on fire, the cause of the disaster having evidently been a paraffin lamp. Kelsall was not in the house, and the fireman Holt, who first entered the house, concluded from what he saw that Mrs. Kelsall had slipped

and fallen when going upstairs with the lamp in her hand, and thus upset it on herself. But Mrs. Curran, after recovering her senses, made a statement that after the visitors left Kelsall had returned, that he took the lamp from the chimney-piece, threw it at his wife, and then ran out by the back door. The corroborations of this story were very slight. The doctor indeed thought that the position of the body was not consistent with the theory of a fall; but it was afterwards stated that it had been moved before he saw it, and Holt the fireman, who saw it first, was not examined at the trial. Apart from the evidence of Mrs. Curran, there was practically no case against the prisoner. Some time after the trial, however, she confessed that her story was untrue, and that she told it because she was afraid of being charged with causing the death herself. She subsequently retracted this confession, and afterwards repeated it again. She was probably too drunk to recollect what really occurred. Her evidence was plainly worthless; but, notwithstanding, the Home Secretary (after receiving a private and confidential report from the police) "saw no reason to interfere." It only remained to prosecute Mrs. Curran for perjury. This was done. She pleaded guilty, and received the *maximum* sentence of seven years' penal servitude, which she served out nearly, if not quite, in full. It will be thus seen that Mrs. Curran was in the room when her sister met her death: that if Kelsall threw the lamp at his wife, Mrs. Curran must have seen it thrown: and that therefore either Kelsall was absolutely innocent or else Mrs. Curran had not committed perjury at his trial. But the Home Secretary treated Kelsall's guilt as doubtful and Mrs. Curran's guilt as certain. The cause of this astounding decision is not, perhaps, far to seek. The judge who tried Kelsall was, I believe, not the same that tried Mrs. Curran. The Home Secretary consulted the judges. One said, "I can only admit that there is enough doubt about Kelsall's guilt to

justify the remission of the remainder of his sentence." The other said, "I have no doubt at all about Mrs. Curran's guilt," and the Home Secretary adopted the opinions of both, regardless of their inconsistency. But what I desire to point out is that the Home Secretary (or the judge to whom he delegated his functions on the occasion) did not regard Mrs. Curran's confession when first made (though supported by other evidence in the prisoner's favour), as sufficient to give rise to a reasonable doubt, just as the various circumstances which were reported on by the Beck Commission did not suffice to convince the officials that there was any reasonable doubt in the case of Beck; and there are numerous other instances, such as, for example, those of Bynoe and Edalji, in which the officials would not acknowledge a reasonable doubt, though the great majority of the outsiders who read the evidence adduced by the prisoner regarded the doubt as not merely reasonable but very grave. Have the officials a different standard of reasonable doubt from other people? Or is it that in many instances the judge or magistrate to whom they refer the case formed and expressed a very strong opinion as to the prisoner's guilt at the trial, and is now very slow to change his mind and express an opposite opinion to that which he then expressed?

Let it be added that the judge is often a busy man, and that the consideration of these appeals forms no part of his ordinary duties. There may be a great deal to read over, and he may have forgotten the details of the trial. But it seems to be the practice of the Home Office to send him the papers almost without note or comment, leaving him to discover the salient points in the new evidence instead of calling his attention to them. Is it surprising if when consulted in this way, with the knowledge that his opinion will not be published or exposed to any hostile criticism, the judge's consideration should sometimes be of a rather

perfunctory character, as it seems to have been in the Beck case?

But without insisting further that the Home Office often only admits reasonable doubt in cases where the general verdict would be established innocence, and refuses to admit a reasonable doubt in other cases where the great majority of competent persons would admit it, can its present mode of dealing with reasonable doubt be deemed satisfactory? It leaves the conviction undisturbed, and the released prisoner is still subject to the various disadvantages which attach to a rightful conviction after the termination of the sentence. Not only, for instance, is he incapable of holding a publican's licence, but if he has been a barrister, a solicitor, a physician, &c., such a finding will do nothing to rehabilitate him and enable him to resume the practice of his profession. His sentence is simply cut down to what perhaps a more lenient judge would have pronounced in the first instance, and as trouble and expense is often incurred in trying to convince the Home Office of the reasonable doubt towards which the State contributes nothing, it is not worth while to bring such an appeal at all unless there is a considerable unexpired sentence. The treatment of the prisoners is of course very unequal. One man has served out almost his entire sentence. Another is liberated at a very early stage, but both leave prison equally empty-handed.<sup>1</sup> If the facts which give rise to the reasonable doubt are not discovered until after the expiration of the sentence—which will usually happen where it is a short one—it is useless to bring any appeal. The appropriate remedy—remission of the remainder of the sentence—is inapplicable, because there is no remainder to remit, and

<sup>1</sup> The public would moreover be much more likely to draw a favourable inference as regards a man who having been sentenced to twelve months' imprisonment, was liberated in a fortnight, than if he had been detained for nine months. He must have been considered innocent, it would be said, or else he would not have been let out so soon.



the Home Office, however satisfied as to the doubt, would I presume take no action. And very probably if the facts were not submitted to the Home Office until the sentence had nearly expired, the decision would be delayed until its expiration. I am not even aware that the prisoner obtains a certificate to the effect that he was liberated because there was a reasonable doubt as to his guilt, without which he would be unable to prove that the liberation was not owing to ill-health or to the undue severity of the original sentence. When there is so little to be gained by an appeal, even if successful, the inducements to bring one are not very strong. The present system is therefore useful in keeping down the number of appeals and enabling Home Secretaries to boast of the small number of miscarriages of justice that come to light—forgetting that this may be not because miscarriages are few, but because the present tribunal for correcting them is inefficient. And, so far as I know, when a prisoner is released on the ground of reasonable doubt, the decision is regarded as final by the Home Office, and no step is taken to clear up the doubt. It is doubtful whether either Da Costa, Underwood, Croucher or Forbes committed the crimes of which they were convicted. But the crimes were really perpetrated. If these men did not commit them somebody else did. Were any steps taken to find that somebody? The wrong man in prison usually means the right man at large; and if the guilt of a man in prison be doubtful there is probably an equally strong case against a man who is free. Are such doubts as these to be left unsolved and no effort made to solve them? The defence of Beck obviously implied that the crimes of which he was convicted were really committed by Smith. How was it that it never occurred to any official from first to last to inquire where Smith was when these later frauds were committed? No man in the community would have been safer than Smith if he had only kept quiet and not

embarked in a further series of frauds. But as he had been in penal servitude and was released on a ticket-of-leave, the police could probably have found him without difficulty if required to do so.

The system of always consulting the judge who presided at the trial had its origin in reason, though that reason has long since passed away. Less than a century ago capital crimes were numbered by the hundred. The judge had no option as regards passing sentence of death in such cases, however unwilling he may have been to do so. But long before the abolition of the death penalty (save for murder and treason) the greater part of these sentences were commuted, and the main duty of the Home Secretary (so far as the Criminal Department was concerned) was to decide in what cases the sentence should be carried out, and in what cases it should be commuted to a milder punishment. Possibly it was at first the judge who wrote to the Home Secretary, requesting a commutation of the sentence which he was compelled to pass, and stating the reasons for commuting it; but 150 years ago the practice of the Home Secretary asking the judge whether he thought the sentence should be carried out or commuted, seems to have been fully established. Indeed, it was the practice of the Recorder of London, after every Sessions, to make a report to the Home Secretary as to how, in his opinion, the capital convicts tried before him should be dealt with. But all this is now altered. Except in cases of murder and some very few other offences the judge can practically pass any sentence that he thinks proper. He has never to ask the Home Secretary to commute a sentence which the law compelled him to pass, but which he regarded as altogether excessive. When an appeal is now made against a sentence it is an appeal (except in murder cases) against the judge: and when it is against the verdict, not the sentence, it is often an appeal against the judge also; for the

judge may have urged and almost directed the jury to convict. Comutations of sentences, which the law compelled the judge to pass, now form a very small part of the functions of the Criminal Department of the Home Office. But the rules as regards consulting the judge have not undergone the changes which the changed circumstances required if efficiency were really aimed at.

As long as the distinction between justice and mercy is adhered to, even as regards questions of innocence and guilt, I apprehend that a mere strengthening of the legal element among the officials will be of no use whatever. What would be thought of employing a number of highly-qualified physicians and then telling them that the treatment of all patients must be homœopathic? The Home Secretary will never do justice until he resolves that appeals for justice shall be dealt with on judicial principles. At present the officials who possess legal knowledge do not use it when it is called for. I shall give an example. A statute passed some years ago rendered it illegal to sentence a boy to imprisonment followed by detention in a reformatory. Some time ago the magistrates at Bishop Auckland sentenced a boy named William Ferguson to a month's imprisonment, followed by detention for a term of years in a reformatory. The sentence was, I believe null and void *ab initio*, but at all events when the term of imprisonment, whether long or short, had expired it was at an end. The Home Secretary's attention having been called to the fact, he remitted the remainder of the imprisonment, and ordered the boy to be removed at once to the reformatory. (The boy had, I think, spent a week in prison.) Attention was then called to this violation of the statute, and the reply was to the effect that the Home Secretary did not decide legal questions but dispensed mercy, and was of opinion that the prisoner's claims for mercy were satisfied by remitting the remainder of the imprisonment. The writer of the letter was, I believe,

an accomplished lawyer. He was probably well aware—at all events he did not deny—that the Home Secretary's order for the removal of the boy from the prison to the reformatory was in direct violation of the statute. But as he was not administering justice but dispensing mercy, what objection could be made to this? The boy was better off under the illegal order of the Home Secretary than under the illegal order of the magistrates, and the former was not more illegal than the latter. What more could be required from a dispenser of mercy?

Nor would a mere strengthening of the legal element on the staff enable the Home Secretary to pronounce a decision which would be accepted as a binding authority by judges and magistrates, and without this the mere redress (even if it were more complete) of a past miscarriage of justice will have no tendency to prevent future miscarriages. The report of the Beck Committee may prevent the erroneous ruling of Sir Forrest Fulton as regards the admission of evidence from being repeated, because two of the members of the Commission were high legal functionaries; but the mere granting of a free pardon to Beck by the Home Secretary in the usual terms would have done nothing whatever to prevent Sir Forrest Fulton's error from being repeated indefinitely, thus producing further miscarriages of justice, perhaps after the lapse of two centuries. If our object is not merely to redress past miscarriages but to prevent future miscarriages, the Home Office is perfectly useless for the latter purpose. It does not seek to trace and to publish the causes that led to the miscarriages which it corrects, and even if it did so, its pronouncements would not be regarded as authoritative by the persons whom it described as most to blame. It is only the reasoned decisions of a Court invested with proper authority that can lead to the removal of the causes which produce

miscarriages of justice; but the careful abstinence of the Home Secretary from anything in the way of censure or criticism is calculated to convey to the criminal Courts that their procedure was faultless, and that if they convicted an innocent man it was owing to a peculiar concatenation of circumstances for which nobody was to blame, and which would not probably be repeated during the next century. Moreover, it often happens that there has been something very objectionable in the conduct of a trial, although even if properly conducted there would have been sufficient evidence to justify the conviction. In such cases a Court of Appeal would probably affirm the conviction, but would take care to signalise and condemn the objectionable character of some of the proceedings, and thus prevent their recurrence. But the Home Secretary's decision is usually expressed in terms which do not imply that he noticed anything whatever in the proceedings that could be objected to.

It may perhaps be thought that a strengthening of the legal element in the Home Office would give more authority to its decisions, and thus lead to preventing future miscarriages of justice as well as correcting past ones. But it would have no such effect as long as questions of innocence or doubtful guilt are dealt with on (so-called) principles of mercy instead of principles of justice. Nor even if this difficulty were removed could its decisions be of much use as long as the grounds of them were not stated; and stating the grounds of its decisions means an abandonment of the whole system of secrecy, which I believe is the main reason why this Department of the Home Office has not been reformed long ago. The effects of an open tribunal soon come to light. They become the subject of public comment, and reform soon becomes compulsory. But it is otherwise with a secret tribunal if there is some person in whom the public reposes confidence (as is usually the case with the

Home Secretary) ready to assure them that everything goes on admirably, though there are special reasons for not letting the public behind the scenes, and thus enabling them to see with their own eyes how perfect everything is. I despair of any genuine reform in the Home Office until its head resolves to take the public into his confidence and to justify his action in the way that public servants in high positions are usually expected to do. One reason for a Criminal Appellate Court is, that any open tribunal is pretty certain in time to become better than any secret one, because it is so much more open to amendment. Secret tribunals may actually become worse while the public believes that they are improving. If "men love darkness rather than light" it is usually "because their deeds are evil."

This secrecy has another ill consequence as regards miscarriages of justice. The applicant whose petition is rejected never obtains the slightest information as to where his case has failed, or what more is necessary in order to obtain a release. The answer is always "No, and don't trouble us again," put into official language. Even when the officials have been almost convinced, they convey to the prisoner that they see nothing whatever in the case presented to them. There can, I think, be little doubt that they wish their interferences with the sentences passed in our criminal Courts to be as few as possible. With this view they discourage the bringing of appeals, and never hold out any hope when rejecting one. Even when shortening excessive sentences the Home Secretary seems to act with as much secrecy as possible, the public being sometimes kept in complete ignorance of the release until long after it has taken place. And the friends of a prisoner are often advised by persons who appear to be in the confidence of the authorities, "Don't agitate. Keep still until the newspapers forget all about the case; and then the Home Secretary may do something for

the prisoner when he finds that nobody is watching him." The officials are undoubtedly very anxious to stop agitation, and whether the methods which they take to stop it are always unexceptionable may be doubted. "Don't agitate or you will injure the prisoner's cause" may be a good rule in the dispensation of mercy, but certainly it is not justice—more especially as the prison rules usually prevent the prisoner from doing anything either to urge on the agitation or to restrain it. When an institution is very sensitive to criticism we may generally suspect that there is something wrong, especially if it observes secrecy with regard to its procedure. A strong and independent tribunal would act in precisely the same manner whether there was agitation or not. It would not yield to clamour, but neither would it refrain from doing justice because it might be charged with yielding to clamour; and if the agitators threw any fresh light on the subject it would welcome that light irrespective of the quarter from which it came. But the Criminal Department of the Home Office is essentially a weak tribunal and, like most weak bodies, it follows the line of least resistance. The minimum of trouble and responsibility appears to be the great object at which it aims; and, as less trouble and less responsibility is involved in an affirmance than in a reversal, the tendency to affirm everything will soon manifest itself, more especially as no reasons for affirmance are required. "The Home Secretary sees no reason to interfere" is the only announcement made—an announcement which in the literal sense is not true; for the reasons for interference are often clear and manifest. What the officials really see (or think they see) is something on the opposite side which they consider of equal or greater weight, but which they refuse to reveal. For example, when Dr. Bynoe produced sworn evidence by a woman who accompanied the culprit, that Bynoe was not the man who either forged the name which he was convicted of

forging, or who fraudulently uttered the document bearing this forged signature, no official could fail to see in this evidence good reason to interfere. But, I presume, there was something that led them either to disbelieve the woman's evidence, or else to believe that Bynoe, though not the principal in the frauds, was an accomplice; and they thought it wiser not to state which, and to write as if the case made on behalf of Bynoe had failed through its own inherent weakness, and that any renewed application would be hopeless. The latter—the theory that Bynoe was an accomplice—seems, indeed, to be put forward in “X. Y. Z.’s” article, though Bynoe’s name is not given. If so, the Home Office convicted him of a new offence behind his back, and then assumed that his sentence would fit the new offence as well as the old one.<sup>1</sup>

#### APPELLANT.

<sup>1</sup> If “X. Y. Z.” refers to the case of Dr. Bynoe he mis-states the facts, for Bynoe was not charged with conspiracy, but tried as a sole offender, save in so far as an unknown woman might have been an accomplice. He was convicted of forging and uttering a document, which according to the evidence which he tendered to the Home Office he neither forged nor uttered. But supposing it to have been a case of conspiracy, two remarks will naturally occur to the reader: First, if he was convicted as the principal conspirator when it afterwards appeared he had only played a subordinate part, why was not his sentence reduced? Second, what was done to find the principal conspirator? The police would of course have followed the directions of the Home Secretary on the subject, and the woman produced a tin-plate photograph of him. Was he sought for, and if so with what result? I am afraid it is another version of the old story. The conviction of the wrong man gives the real culprit an immunity for the rest of his life if he will only keep quiet.

As regards the concealment of miscarriages of justice, it has been stated that when prisoners are released on a ticket-of-leave they are sometimes cautioned against making any claim to innocence, with an intimation that if they did so the ticket-of-leave might be recalled. I hope the Home Secretary will be able to give an authoritative contradiction to this statement. But I think it may be safely said that the Criminal Department of the Home Office is not anxious that miscarriages of justice should come to light or that much should be said about them when they are detected.



### III.—NULLIUS FILIUS: "THE STRANGER IN BLOOD."

(Continued from page 270.)

Thus far, we have been dealing with the meaning of the word "child" as interpreted by the Courts when cases of construction come before them to be determined. The words "son," "daughter," and other expressions of kinship, undoubtedly apply to natural as well as lawful relatives, in view of the marriage tables of kindred and affinity; and it is worthy of remembrance that these tables, applying as they admittedly do to natural, *i. e.*, blood, relationship, must be regarded as part of the Common law of the land, since they are acted upon by the High Court of Justice. Matrimony within the specified degrees of kindred is unlawful, for the tables regard the actual or natural state of kinship, and it would clearly be no answer to any proceedings in the case of a "marriage" within the prohibited degrees, to quote the mutilated metaphor "*nullius filius*," otherwise a man might marry his mother, which, in the words of Mr. Justice Maule, "could not be permitted" (*Rex v. Hodnett*, 1 T. R. 96). Unfortunately this fanciful simile is treated by some as if it were a fact, and a *bonâ fide* belief that the provisions of the tables of kindred and affinity do not include illegitimate relatives is induced, and in consequence "marriages," in honest belief of their validity, are sometimes contracted within the forbidden degrees. That mere metaphors should ever be thus mistaken for facts, and treated as producing the same effects, is lamentable, and the mischievous consequences which this confusion in the mind produces is well illustrated by the following example: B., who was separated from his wife during her lifetime, "married" his wife's niece, and by her had a spurious daughter, who was many years younger than his lawful children. Ultimately a grandson of B.

"married" this spurious daughter, his illegitimate aunt, in the belief that her double illegitimacy caused by B.'s bigamous connection with her mother, a person within the prohibited degrees of affinity, rendered the "marriage" lawful. The parties *bonâ fide* believed that the tables of kindred and affinity did not apply to illegitimate relatives, that in fact they were "no relation," although it will be observed that they were actually more closely related than usual. Instances of "marriages" between still nearer relatives are not unknown. Such cases afford very strong reason for insisting that the phrase "*nullius filius*" is a mere simile and not a statement of fact or law.

But we are not left to the ordinary grammatical meaning attached to the various terms of kindred, or even to the interpretation of the table of kindred and affinity, which some might urge were framed by ecclesiastical lawyers for a special purpose. For cases have occurred in which it has been clearly laid down by the judges that the word "child" is one of general significance, importing both those of lawful and illegitimate birth. In the case of *R. v. Inhabitants of Edmonton*,<sup>1</sup> the point for decision was whether the marriage of a bastard under age with the father's consent was a lawful one, since the Marriage Act, 26 Geo. II, c. 33, required the consent of the father, guardian or mother, to the marriage of minors. The Court decided that it was lawful, and Mr. Justice Willes, in pointing out that the Act ought to have a liberal construction, observed that the word "lawful," as annexed to child, was not in the statute; and Lord Mansfield said: "There was no reason to except illegitimate children, for they were within the mischief intended to be remedied by the Act;" while Mr. Justice Buller added, "that the rule that a bastard is *filius nullius* applies only to cases of inheritance." This case is perhaps as strong as any, showing that in Acts of Parliament the word child without the prefix

<sup>1</sup> Bolt's *Poor Laws*, II, 61.

"lawful" has a general significance, and also demonstrating that the law always recognises the natural kinship of parent and child when ascertained, but that in the case of intestate inheritance it annexes a special disqualification, of which the practical effect is that the child becomes, as Littelton puts it, "*quasi nullius filius*."

That this particular and exceptional incapacity annuls legal recognition is no more the case than it was when the crime of the ancestor placed the descendants virtually in the same position as illegitimate children, in that the fiction of "corruption of the blood" prevented all honours and rights of property descending through the polluted channel. Yet there never was any pretence for saying that the son of an attainted peer was a *nullius filius*. Another instance of the emptiness of the metaphor we find in the fact that, according to statutory requirements, the entry of registration of the birth of an illegitimate child must include the name of the mother in all cases when known, and permits the father's name to be inserted when he consents to it.<sup>1</sup>

It was also decided in *R. v. Cornforth* (2 Stra. 1162) that the statute 4 & 5 Ph. & M., c. 8, since repealed and re-enacted in 24 & 25 Vict., c. 100, which rendered it a criminal offence to take an unmarried girl from the possession and against the will of her father or mother, applied to the case of a natural daughter taken from her putative father's custody, for "the wider construction obviously carried out more fully the aim and policy of the enactment."

<sup>1</sup> We may also refer to the practice of heraldry, which is part of the law of the land, and is so recognised in Acts of Parliament. When an illegitimate son is desirous of bearing arms, he obtains permission to use his paternal coat distinguished by a due "difference." This is usually a bordure wavy, though in the case of the Royal family a "baton" across the coat of arms is adopted, a difference to which popular ignorance has applied the impossible term "bar sinister." Here it will be observed it is the nature of affiliation which is distinguished. The fact of filiation, when once ascertained, is not in any way denied.

It has been stated that an illegitimate child has no legal guardian, not even the mother or the putative father, though certainly when a putative father nominates a guardian by will the Chancery Division usually respects his choice and confirms the appointment. Perhaps the strongest case in favour of the view that the law takes no cognisance of illegitimate relations, is that of *re White* (10 L. T., O. S., 349), in which Mr. Justice Wightman refused to give an illegitimate child into its mother's care, saying that neither the father nor the mother had any particular right to its custody. But a more reasonable view of the law prevailed in the case of *Reg. v. Nash, In re Carey* (10 L. R., Q. B. D. 454), decided on appeal, before the late Sir George Jessel and Lord Justices Lindley and Bowen, which recognises in the fullest manner the natural rights of the parent. In this case the question involved was that of the custody of an illegitimate child, and the Master of the Rolls, in giving his decision, said, when speaking of the parties who desired to retain the child against the wishes of its natural mother:—

"Yet they have gone so far as to contend, by their counsel at the Bar, that the actual mother is no relation to her child and can have no better title to it than a mere stranger. No words of mine can exaggerate the absurdity of the contention. Mr. Justice Maule, in *In re Lloyd*, is reported to have said: 'How does the mother of an illegitimate child differ from a stranger?' I should have thought the answer to that would be: Because she is the mother. In a Court of Equity, not only has the right of the mother been recognised, but even that of the putative father. The Court simply looks to what is for the benefit of the child. There are, according to my recollection, many cases in which the right of the mother to the custody of her illegitimate child has been recognised. There is in this case that sort of blood relationship which, though not legal, gives the nearest relations the right to the custody of the child. It is the plainest possible case for giving up the child to its blood relations."

It will be noticed that this case clearly acknowledges illegitimate blood relationships; although the relationship in this case was "not legal," the Court admitted its existence, and denying the extraordinary theory that the mother and her child were "strangers in blood," gave such a judgment

as they might have done if the mother had been lawfully married to the child's putative father.

In truth the term "illegitimate," beyond the particular disqualification already referred to, merely indicates that the circumstances of the birth of a natural child are in contravention of the ceremonial requirements of the law. As regards the question of the custody and maintenance of children, the same rule, that it devolves on one of the parents, obtains with both classes of children; with legitimate children the responsibility primarily falls upon the father, with illegitimate children upon the mother. And the reason for this distinction seems clear, for, at the time of the birth of an illegitimate child the father is from a legal point of view an unascertained person, and special proceedings must be taken to determine the paternity before any contribution for maintenance can be exacted from him. The fact of the child's kinship gives its parent a *primâ facie* right to its custody, but it is only a *primâ facie* right even in the case of legitimate children, and may be taken away by the Court if it is, or the Court thinks it is, for the child's benefit that its parents should be deprived of its care. Of this practice the poet Shelley's case was a notable instance.

Some observations made in the case of *Rex v. Inhabitants of Hodnett* (1 T. R. 96) are worth quoting:—

"There was not therefore any pretence for saying that illegitimate children were not included in the Marriage Act [of George II, which required the consent of the father, guardian or mother, to the marriage of persons under age who are not married by banns]; the only reason which could be suggested for this was founded on the old maxim, *filius nullius*, but in point of law that maxim was not universally true, for then a bastard might marry his own mother, which could never be allowed. (*Haines v. Jessell*, 1 Ld. Raym. 68.) The only way in which it was true was that a bastard had no inheritable blood" (Co. Litt. 123), where it is said that a bastard is *quasi nullius filius*, because "he cannot inherit. Blackstone (*Com.* I, 459), confirmed the same position. A father has a right to take his illegitimate child out of the parish."

There is one case which forms an apparent exception to the rule that in statutes "children" is a general term. In

*Reg. v. Maud* (2 Dowl., N. S., 58), it was held that the Act which punishes a man for running away from his wife "and children," thereby leaving them chargeable to the parish, applies only to the desertion of legitimate children. The reason for this narrow interpretation of the word "children" probably is to be found in the context, where it immediately follows the word "wife." Hence the inference that lawful relatives only are referred to.

It is worth observing that in the practice of the Probate Division, which, derived as it may be from the civilians, is now administered by the High Court, it is customary to describe relatives as "natural and lawful." If "child" or "son" had merely the narrow meaning in law of a legitimate relative only, the addition of these words would be a mere pleonasm. Their use, however, points out the fact that the word "son" is an ambiguous term, and does not give, necessarily, any hereditary right to succeed to, or administer the goods of the deceased parent. Hence the need of adding the word "lawful."

The ambiguity of the term children is also shown by the doubt which has been raised whether that word may not include grandchildren, on the ground that the prefix "grand" is merely a qualifying adjective pointing out a particular class of children. But it has been decided that "grandchildren" do not take under a devise to "children," and that the same rule applies, *à fortiori*, to "great grandchildren." The point which must be borne in mind in attempting the interpretation of wills is the intention of the testator, and though the rule is that the legal and narrower sense must usually be attached to the word "children," yet, if upon the face of the will there is anything which shows that the testator intended it to have a more general and inclusive meaning, that effect will, if possible, be given to the expression used. Necessarily some conventional rule of

interpretation must be adopted in cases where testators neglect to guard against ambiguity.

We have thus considered the various meanings attached to the word "child" by the Courts when engaged in the interpretation of wills, and how the necessary presumption that it signifies legitimate issue in the first generation may be rebutted. Now, as the word "father" occurs in the same context as "child" in the Legacy Duty Act, it would be worth while, were it possible, to inquire what interpretation should be attached to the former term in the case of a bequest by an illegitimate child to his father. Unfortunately, no cases bearing upon the point appear to have been decided. The reason for this is plain, for legacies to any parents are necessarily rare, and those to natural parents must be still more uncommon. Nevertheless, we may presume that a legacy given to his father by an illegitimate son would be an effectual one; that though the term "father" presumptively means a legitimate relative, yet that conclusion is at once rebutted if the facts so require, as they do in the case just suggested.

In respect to the allegation that an illegitimate child is *nullius filius*, it is worth while considering the right of maintenance by their parents which illegitimate children have equally with those who are legitimate, from which we shall see, that in such matters the relation of a parent and child is clearly recognised at law, although the obligation must, in the case of the father, be enforced in a special manner.

"The duty of parents to their bastard children," says Blackstone, "is principally that of maintenance, for the ties of nature, of which maintenance is one, are not so easily dissolved, and they hold indeed as to many other intentions." The manner of ascertaining the paternal obligation constitutes, therefore, the sole distinction in this respect between the two classes, and it is one of a formal or administrative character which has no bearing upon their status. In the

one case the marriage ceremony at once fixes the obligation upon the father,<sup>1</sup> in the other it primarily devolves upon the mother, and the father's liability does not arise until after the paternity has been ascertained by a judicial process based upon an allegation made by the mother. When once the fact has been judicially determined, and the amount of maintenance fixed under the provision of the Bastardy Acts, the paternity of the child is as little a matter of doubt as if it had been born in wedlock, and the status of the father is as clearly defined.

Another clear instance of the acknowledgment in law of illicit parental relations is shown in the Poor Law, under which an illegitimate child retains its mother's settlement until it acquires a fresh one, though formerly this was so only until the age of sixteen, after which it reverted to the original birth settlement.

We will now refer to some of the results which a foreign domicile of the parents at the time of marriage may have upon the status of the children. When the parents are English, and domiciled in their own country, only those children born subsequently to the marriage are legitimate according to the Common law, and if there chance to be any *antenati* there exist no means of legitimating them, except, of course, by the transcendent power of Parliament, although it has been said "*Ecclesia tales habet pro legitimis*,"—the church counts such as lawful children. But if the parents at the time of marriage are domiciled in a foreign country, where legitimation *per subsequens matrimonium* is recognized, all the children, including the *antenati*, are, broadly speaking, equally legitimate in this country, provided of course that the requirements of the foreign law have been complied with. This doctrine was recognised in 1871 in

<sup>1</sup> Even in marriage the legitimacy of a child is a matter of presumption only, and may be rebutted. *Hawes v. Draeger* (48 L. T. R., N. S., 518). See also the decision in the recent *Poulett Peerage Case*.



*Skottowe v. Young* (L. R., 11 Eq. 474), when the *antenati* of an English father domiciled in France were declared to be the lawful children of their parents, and consequently liable to one per cent. legacy duty. In this case the Revenue had claimed ten per cent., and here it was assumed that illegitimate children are "strangers in blood," and so liable to the highest rate of duty. As the legatees were decided to be lawful children of the predecessor, there was no necessity to discuss the question, what rate of duty is payable by illegitimate children, and the point does not appear to have been yet fully decided.<sup>1</sup> Stuart, V.-C., said, "The daughters are legitimate by French law, and must therefore in this country be considered as having the status of children, and it is difficult to see how in any sense they can be 'strangers in blood.' When the Legacy Duty Act uses these words, it is a description of the status of the person." It is not easy to say what meaning the Vice-Chancellor wished to convey when he used the word "status." Must it be inferred that a "stranger in blood," as contemplated by the Act, possesses certain attributes which do not belong to such an individual in ordinary parlance? There is certainly nothing in the context of the Acts to justify any other meaning being given to the phrase than the ordinary

<sup>1</sup> A case was decided in 1882 by Vice-Chancellor Hall, in which that judge held that illegitimate children were liable to pay ten per cent. duty, as he stated, in his judgment, that such were "unquestionably, according to English law, 'strangers in blood to their father'" (*Anderson v. Atkinson*, 21 Ch. D. 100). This at first sight seems to decide the point; but it is submitted that it does not do so. The case arose upon the question whether certain persons, who had the peculiar status under the Italian law of being acknowledged illegitimate children, were lawful children in England. No argument took place as to the meaning of "stranger in blood," and both by counsel and judge there seems to have been a tacit assumption that, given proof of illegitimacy, it followed that such were "strangers in blood," without need of further inquiry. The learned judge decided against the claim, holding that in England there was no intermediate status, and determined that they must pay duty at the rate of ten per cent. But it was never carried before a higher Court, and as the broad point that an illegitimate child is still a "child" within the Revenue Acts, was not discussed, it is submitted that the question must be regarded as still an open one.

grammatical one, and the absence of any interpretation clause defining the expression justifies a refusal to attach a special signification to it. In this case, as in *Anderson v. Atkinson*, it was apparently assumed throughout on all sides that illegitimate children are "strangers in blood," and hence the broader question was never argued.

The case of *Boyes v. Bedale* (1 H. & M. 798), was a somewhat similar one of legitimation, under the French law, of the children of an Englishman domiciled in that country. Property in England was claimed, under a will made long anterior to their birth, by the children of the testator's nephew, born after the testator's death, who had been legitimated, and the question arose whether such legitimated children answered the description of "children" in the testator's will, having in view the presumptive meaning attached to the term in wills. The narrowest meaning was given to the word by Page Wood, V.-C., who, though not controverting the position that these children were legitimate both in France and England, held that they nevertheless could not take. "The testator," said the Vice-Chancellor, "must mean such persons as the law of England would regard as the children of the testator's nephew. He cannot be assumed to know that there is any other kind of child extant." Why such ignorance should be imputed to a testator it is difficult to see, and it is submitted that Lord Hatherley's judgment somewhat needlessly introduces an exception to the statement that the legitimacy of a person is determined by the rules of the law of that country where its parents were domiciled at the time of marriage. For all purposes save the inheritance of real estate the parties were strictly legitimate, and the practical effect of the judgment is, that the testator is made to draw a distinction between the different sorts of legitimate children. In reality, it still further narrows the meaning in wills of "child," so that the

usual statement, that it presumptively signifies lawful child, must be modified so as to exclude those lawful children who obtain their legitimacy by the operation of a foreign jurisprudence, subsequent to the testator's death, the effect of which otherwise is nevertheless recognised in this country.

In *Birtwhistle v. Vardill* (2 Cl. & F. 571), a curious anomaly was determined. A child born in Scotland of parents domiciled there, who at the time of his birth were not married, but who afterwards intermarried in Scotland, without any lawful impediment to their marriage, either at the time of his birth or afterwards, though legitimate both in Scotland and England, cannot take as heir the lands of his father in the latter country. It is not enough to be merely legitimate, the additional qualification of birth in wedlock is absolutely necessary to entitle the eldest son to succeed as heir to his parent's real estate. As the result, we see that in England there are practically several distinct classes of children:—

1. Bastards, who cannot possibly be legitimated under any law.
2. Natural children, whose parents never inter-marry.
3. Natural children, who become canonically legitimate by the subsequent marriage of their parents, and are viewed as legitimate in almost every country except England.
4. Such members of the last class who are legitimate in England also by reason of their parents' foreign domicile at the time of marriage.
5. Those who are born in wedlock, the *postnati*, who alone are capable of adding to the status of "natural and lawful child" the peculiar quality of heirship.

We may infer from the cases that the members of the 4th and 5th classes are equally entitled on intestacy to succeed to the personalty of their relatives, and probably that children

of the 4th class would be permitted by the Inland Revenue officials to pay duty on legacies at the lowest rate, and possibly also in the case of successions to realty under a will or settlement. The following question may be asked with respect to the declaration which is exacted by the Inland Revenue from the legatee as to relationship to the deceased. Does a legatee or a successor, who is illegitimate, either wholly, or partially only as in the third class, and who describes himself as a "child or lineal issue" of the deceased and offers to pay one per cent., violate the provisions of the Act which refer to oaths or affirmations made falsely for the purpose of defrauding the revenue. In other words, could he be convicted for perjury? It is surely a sufficient compliance with the Act, and it is difficult to think that such a statement can be viewed as a false one, for a legatee cannot be supposed to know that any distinction exists between the various classes of children beyond the Common law one of incapacity to inherit. Even that difference is not even hinted at in the Acts, and, as we have seen, illegitimate children are continually recognised at law and in equity as "children."

As bearing upon the question generally, some attention must be paid to the rules usually recognised by the Courts in their interpretation of Statute law. It is a presumption always acted upon, that the legislature did not intend to enact an injustice or absurdity, and hence, when an injustice apparently arises, we are bound to examine closely whether such a result can be clearly deduced from the words of the Act. A doubtful expression must be interpreted as is most consonant with the theoretic justice of the age. In the case before us it certainly seems very inconsistent with justice to inflict upon the child a heavy fine for the delinquencies of the parents, and we have no right to infer that this has been intended by Parliament, unless the statute expresses such an intention in clear, explicit, and unambiguous terms.

Especially does this seem a hardship in the case of those who, by reason of the subsequent marriage of their parents, are viewed as legitimate by the Civil and Canon law, and the laws of almost every Christian country besides our own.

The presumption against absurdity also militates against the claim. In no common-sense view of the question is it possible to say, that it is not an absurdity to depart from the plain grammatical sense of the words "a stranger in blood," and to apply it to a person who in every point of the law, but that of succession to property and title, is regarded as the child of his actual parents. And if this view, that an illegitimate child necessarily cannot be regarded as a "stranger in blood," be correct, then the presumption against evasion will prevent advantage being taken of the mutilated maxim or metaphor "*nullius filius*" as a means of escaping payment of even the one per cent. duty. Moreover, just as some statutes are to be construed liberally, so some must be interpreted strictly. Of the latter class are statutes, such as the Legacy and Succession Duty Acts, which impose penalties or encroach upon rights or impose burdens upon the subject. This rule of strict interpretation is well put by Sir P. B. Maxwell in his work, *The Interpretation of Statutes* (p. 348): "Statutes which impose pecuniary burdens also are subject to the rules of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language. The subject is not to be taxed unless the language of the statute clearly imposes the obligation. In cases of doubt, the construction most beneficial to the subject is to be adopted." Even with the most favourable view of the position of the Inland Revenue claim, it is impossible to say that the demand for ten per cent. is authorized by "clear and unambiguous language." Again, Mr. Wilberforce in his book, *Statute Law*, says: "Acts which impose taxes are to be construed strictly, and so are such as impose duties

or any other burden upon the public; the Acts themselves being construed strictly, while any exception which confines the operations of such charges or duties, is to be construed liberally." These maxims we venture to think seem very sufficient authority for saying that the exaction of ten per cent. legacy or succession duty is quite unjustifiable, seeing that it is not imposed by the Act upon illegitimate children in clear and explicit terms.

It may be suggested that after one method of interpreting a statute has been in use for upwards of a hundred years, it is somewhat late to suggest another, and that the presumption of long usage is in favour of the present practice. But the custom or practice of a Government department, though ancient, is no criterion for the interpretation of the law, and we may more properly say, on the other hand, that every action of official bodies should always be closely scrutinised, especially when it takes the form of imposing a penalty upon any particular class. No more respect, perhaps indeed less, is due to the opinion of officials upon a point of law, than to that of ordinary laymen, and it may be presumed that should such a question as the present one come ever before the Courts for judicial decision, no judge would consider himself in any way fettered by the practice of the Inland Revenue Department.

It may be asked why this question should have been allowed to remain so long without a judicial opinion being taken upon it. As an explanation of this, it is suggested that the majority of cases affected are those in which the persons interested would prefer to pay any claim, however exorbitant, rather than publish their peculiar family relations to the world. A precedent in this way once formed, those who could afford to contest the question would regard themselves precluded from all chance of avoiding the extortion. A close examination of the claim shows, that though it has no more solid basis than a realistic treatment

of a phrase, which is a mere metaphor or simile, yet it is acquiesced in through reverence for custom and precedent.

We therefore conclude that illegitimate children are not "strangers in blood," but "children" or "lineal issue," and consequently liable to only one per cent. duty.

The arguments for and against the Inland Revenue contention may be thus summarised:—

1. The maxim "*nullius filius*" justifies the assumption that an illegitimate child is a "stranger in blood," and hence liable to pay the highest rate.
2. That the Inland Revenue deals with property in respect of which it is that the peculiar disqualification of illegitimacy exists.
3. In cases of intestate successions, the Crown, when granting out the estate to the illegitimate next-of-kin, usually reserves one-tenth for its own use.

On the other hand:—

1. The maxim "*nullius filius*" is merely a mutilated metaphor from Littleton—a mere phrase—is not a fact, nor are the natural consequences of a fact deducible from it. And it has been decided that the maxim applies only in cases of inheritance.
2. That the words of the Act "strangers in blood" have a perfectly intelligible, grammatical sense, which militates against the theory that they include natural relatives. Moreover to this the additional objection must be urged, that it introduces an intentional legal fiction at so late a date as 1796.
3. The word "child" is a general term, and when it occurs in Acts of Parliament is usually so interpreted, and though in wills it presumptively means a lawful child, yet that is but presumption, and can be rebutted if the will is only to be satisfied by the admission of illegitimate children.

4. Illegitimate children are subject at Common law to no further incapacity than the one of not inheriting in cases of intestacy. Any further incapacity or liability should be sought for in the explicit terms of some statute.
5. Revenue Acts, in so far as they impose burdens, must be interpreted strictly, and this is especially so when the burdens, as in the legacy and succession duties, are distributed unequally.
6. No express or implied intention is shown by the Legacy or Succession Duty Acts to inflict a fine upon illegitimate children. Any new incapacity or penalty can only be imposed deliberately, and not by indirect means in a mere revenue Act.

The foregoing arguments offer, it is hoped, a conclusive answer to the practice so long followed by the Inland Revenue officials, by which they have imposed a heavy tax upon illegitimate children, and in so doing have rendered their ambiguous position still more painful by the practice of terming them "strangers in blood," an application of the phrase which, we may venture to assert, is no more required by the law than it is demanded by grammar or common sense.

It may be said that the retention of this charge is an advantage to order and morals, but apart from the objection that ethics do not belong to the province of revenue laws, it is difficult to see how morality can be advanced by inflicting the penalties upon the innocent, rather than upon those who have neglected the ceremonial requirements of the law. If such penalties ought to be inflicted, this view might be carried a little further, by converting all foundling hospitals into gaols for the perpetual imprisonment of illegitimate children. It is, however, important to observe that even if illegitimate children are only liable to the lowest rate



of duty, this view will not affect those persons to whose neglect of the legal requirements their children's illegitimacy is due, for they would still incur the highest rate of duty on succeeding by will to one another's property. They are "strangers in blood," and it is manifestly inexpedient that the special privilege of exemption from legacy and succession duty which is granted to husband and wife, should be accorded to the parties to an irregular union. At present, in the case of a subsequent marriage, the parties to it escape the payment of all legacy duty, while their children, born before marriage, according to the Inland Revenue interpretation of the law, incur the penalty of paying the highest rate of duty. Thus we have this very unsatisfactory and, indeed, grotesque result, that while a penalty is inflicted upon the innocent children the parents escape any such consequence of their fault.

It should always be borne in mind, that the English Common law is probably more stringent than any other in determining legitimacy. No distinction is drawn by it between the children of a concubinage hardly to be distinguished from marriage, and afterwards canonically legitimated by the marriage of their parents, and the offspring of forbidden or promiscuous unions, the *spurii* and *vulgo concepti* of the Roman law. Hence it is submitted that in England, at least, it is very necessary that no further incapacity or disqualification should be inflicted upon illegitimate children than that to which they are already subjected by the Common law, namely, the inability to derive any title to honours or property in intestacy either from or through their ancestors; while all who would strain the terms of the Legacy Duty Acts in their disfavour should remember that Blackstone, though approving the English rules of legitimacy, wrote in his *Commentaries*, that "any other distinction but that of not inheriting, which civil policy renders necessary, would be . . . odious, unjust and cruel to the last degree."

W. P. W. PHILLIMORE.

#### IV.—DEFINITIONS OF ACCIDENT, ACCIDENTAL ACCIDENTALLY.<sup>1</sup>

IF it were not classical, one would refrain from quoting before a learned society the opinion that "definitions are of all things the most damnable." In profitable discussion, however, it was a salutary rule of PASCAL to insist, as well upon the definitions of terms employed as the proofs of propositions propounded. In this present particular, indeed, we have a signal example of the stimulating influence which our Masters of Science, furnished with their exact facts, have been able to exert upon the practical application of conservative principles of law. Conceptions of human diseases have been introduced into the realms of knowledge which have modernised considerably the dicta of forensic pathology—the incursion of the microbe has enforced legal recognition by both judge and jury.

In the loose usage of the term ACCIDENT considerable confusion arises from a fundamental ambiguity of meaning. Reference may be intended either to the morbid effects upon the body of the person injured or to the mechanical cause of the operative injury. Thus, it needed a judicial decision to affirm that one tramway "accident" might include as many as forty "accidents" (*South Staffordshire Tramways Co. v. Sickness & Accident Assurance Association*, L. R. [1891], 1 Q. B. 402 C. A.). The pathological applications of the term alone are here dealt with. No notice is taken of "inevitable" and other accidents inquired into by the Admiralty Division or reported to the Board of Trade. Nor will accident—"any unforeseen and undesigned event productive of disadvantage"—as a ground for equitable relief be considered.

From the standpoint of Legal Medicine there are three sets of occasions, chiefly, when the term ACCIDENT comes under forensic consideration, *viz.* :—In—

<sup>1</sup> A Paper read before the Medico-Legal Society (London).

- I. The verdict of an inquest jury: "accidental death."
- II. Accident Insurance policies and Friendly Society rules.
- III. Workmen's Compensation Acts, to which may be added Common law claims arising from alleged negligence.

I. "*Accidental death*" as an inquest jury's verdict.

Coroners' juries are often directed to return "an open verdict." Otherwise, it is probable that, where the cause of a person's death is unnatural or sudden and unknown, "accidental death" would be the presumption, as it was in *Harvey v. Ocean Assurance and Guarantee Co.* ([1905], 2 Ir. Rep. 1), where a corpse was dragged from a river.<sup>1</sup> Such a verdict often is, in fact, an affirmation that the violence precedent to or the other causation of death was, in the opinion of the jury, of a non-criminal nature, that is, it was misadventure, *judicium infortunium*. Where, however, *res ipsa loquitur* against an accident, homicide is indicated, and "all homicide is presumed to be malicious and amounting to murder, until the contrary appears from circumstances of alleviation, excuse, or justification" (4 *Bl. Com.* 201).

Several pertinent questions project themselves logically into later sections of this inquiry. How far is the verdict of an inquest jury binding in subsequent civil and criminal proceedings, as, for example, in support of an accident insurance claim or in opposition to a Grand Jury's "*No true bill*"? Conversely, should fatal occurrences, after which the representatives of the deceased receive compensation upon a policy of accident insurance, necessarily have passed through the coroner's court? In considering how far verdicts in criminal cases may be received as evidence in civil suits, if the verdict is returned by an inquest jury, it may be objected that the strict rules of forensic evidence were not enforced, thus hearsay testimony

<sup>1</sup> Cf. *Walcott v. Metropolitan Life Insurance Co.* (33 Am. St. Rep. 923 [1891]).

probably was admitted for their consideration. When the question arose, how a soldier, mortally wounded, "at the front," should be treated if he died after he returned home, the Home Office left it to individual coroners to use their discretion. The recent inquest upon the victims of the North Sea Outrage resulted in "open verdicts." Mr. R. B. D. Acland, K.C., acting officially, requested the jury not to return a verdict of wilful murder or manslaughter against some person or persons unknown. Even murder and manslaughter have been allowed by insurance companies as "accidental deaths," although a verdict of unqualified suicide, *felo de se*, is usually excluded from the scope of the policy.<sup>1</sup>

## II. "Accidents" within the meaning of definite Insurance Policies or Friendly Society Rules.

The sense of the term ACCIDENT and its possible extensions are restricted in this connection deliberately by the insurers. A common definition is: *Any bodily injury caused by violent, accidental (sic), external and visible means, and resulting in death or disablement within three months of the accident.* It is to be noted that it is the means, and not the injury to the body, which must be "external." Death, a serious illness, or a deformity may follow an accident, although it may not be the natural and probable result of that accident; such cases lead to frequent litigation.

The word "accident" usually appears twice in insurance policies: (i) in the detailed relation of the assured's past history, formally set forth in the restrictive covenants of the proposal; this relation is regarded by the Court as containing declarations almost in the nature of statements *uberrimæ fidei*; the questions asked must be fully and truthfully answered, (*Jewsbury v. British National Life Insurance*

<sup>1</sup> Cf. *Ellinger v. Mutual Life Insurance Co.* [1904], 116 L. T. 523, where suicide during temporary insanity was urged as an accident.

*Co.* [1905], *The Times*, Feb. 23; *Thomson v. Weems*, L. R. [1884], 9 A. C. 671, H. L. Sc.); (ii) in the declaration of the liability recognised by the company should a personal injury result. It might be thought that in this connection at least there was an abundant source for actionable disagreements, but as a matter of fact reputable insurance companies "usually settle small claims, or else by previous arrangement send disputes to arbitration: an instance where the latter course was adopted is detailed in *The Lancet* (July 25, 1904). Occasionally, however, a dispute arises in which either a broad general principle or a very heavy dubious claim is involved, and where the insurance office, often a Scotch office, desires a settlement of the doubt by a judicial appeal.

The insurance company, apart from a special agreement, has no power to demand a necropsy upon the body of the assured (*Ballantine v. Employers' Assurance Co.* [1893], 31 Sc. L. R. 230), nor can it claim to be represented at a personal medical examination, nor during a necessary surgical operation (in 111 *Law Times*, 296, is a direction by the Home Office on this point, in connection with the Workmen's Compensation Act 1897). Failing an inquest jury's verdict after a fatal accident, an undertaker or an embalmer may afford the company pertinent facts.

The following is a series of decisions as to the nature of an accident within the terms of the specific insurance policies (*q. v.*):—

#### ACCIDENTS:

1856. 1870. 1880. Drowning, especially when consequent upon an internal disease such as Epilepsy.

*Trew v. Railway Passengers' Assurance Co.* 30 L. J., Ex. 317.

*Reynolds v. Accidental Insurance Co.* 22 L. T. R. 820.

*Winspear v. Accident Insurance Co.* 6 Q. B. D. 42 (C. A.)

1859. Spinal injury from lifting weights.

*Martin v. Travellers' Insurance Co.* 1 F. & F. 505.

1864. Hernia after fall ; necessary operation ; death.  
*Fitton v. Accidental Death Insurance Co.* 34 L. J.,  
 C. P. 28.
1881. Falling under railway engine during sudden illness (a fit).  
*Lawrence v. Accidental Insurance Co.* 7 Q. B. D. 216.
1887. Paring corn leads to fatal gangrene of leg.  
*Durham Spring Ass. Cave, J.* (*The Times*, Jan. 26.)
1889. Shoulder dislocated ; while lying up was restless ; pneumonia contracted ; death within a month.  
*Isitt v. Railway Passengers' Assurance Co.* 22 Q. B. D.  
 504.
1893. Cartilage in knee-joint dislocated while stooping.  
*Hamlyn v. Crown Accidental Insurance Co.* 1 Q. B.  
 750 (C. A.).  
 [Esher, M.R., "unexpected result." Lopes, L.J., "something unforeseen and unexpected and casual."]
1896. Mental shock, without physical impact.  
*Pugh v. London, Brighton and South Coast Railway.*  
 2 Q. B. 248 (C. A.).
1903. Scratch on leg ; erysipelas in one week ; septic pneumonia one week later ; death one week later.  
*Mardorf v. Accident Insurance Co.* 1 K. B. 584 (C. A.).  
 [Wright, J., "not an intervening cause."]

NOT ACCIDENTS :

1861. Sunstroke after exposure ; death same day.  
*Sinclair v. Maritime Passengers' Assurance Co.* 30 L. J.,  
 Q. B. 77.
1870. Wound in foot ; erysipelas in five days ; death on seventh day from injury.  
*Smith v. Accident Insurance Co.* 5 L. R., Ex. 303.
1885. Fall ; dislodgment and impaction of gall-stone ; death.  
*Cawley v. National Employers' Accident Assurance Association.* C. & E. 597.
1889. Poison swallowed, mistaken for medicine ; death (policy excluded such cases).  
*Cole v. Accident Insurance Co.* 61 L. T. R. 227.
- 1889 (Sc.). Thrown from carriage ; Bright's disease aggravated ; death.  
*M'Kechnie's Trustees v. Scottish Accident Insurance Co.*  
 17 C. S., 4th s., 6.

1892 (Sc.). Prolapse of hepatic flexure of colon while pulling on stocking; fatal obstruction of bowel.

*Clidero v. Scottish Accident Insurance Co.* 29 Sc. L. R. 303.

1904. Syncope after ejecting a drunken man.

*In re Scarr and General Accident Assurance Co.* L. R. [1905], 1 K. B. 387.

[For American cases of death from inhalation of illuminating or anæsthetic gases, *vide* 102 L. T. 299.]

### III. "Accidents" within the meaning of Statutory Enactments.

Apart from the general Common law liability for negligence, the definition and interpretation of "an ACCIDENT within the meaning of the Act" did not demand practical consideration until claims arose consequent upon the passing of the Workmen's Compensation Act 1897. The earliest statutory uses of the term in question appear to be in 14 George III, c. 78, s. 86: "Any Fire shall . . . accidentally begin . . ." (1774), and in 34 George III, c. 26, s. 15, "or from any other Accident" (1794). In reference to the human body the word occurs in the Factory Act 1844, s. 22: "Accident . . . cause any bodily Injury," and in the title, but not in the clauses, of the Fatal Accidents Act 1846, and again in the Notice of Accidents Act 1894. The Act of 1846 deals with the penalty for "a wrongful act, neglect or default." The Employers' Liability Act 1880 is concerned with bodily injuries the result of negligence.

For many years the ideas of something mechanical and violent, fortuitous and unexpected—other than "an act of God"—have been associated with a legal, that is, an actionable accident. "We have changed all that." It is noteworthy that the Employers' Liability Act 1880 became law while microbes first were making themselves seen: The Workmen's Compensation Act 1897 came into force when pathologists had taken sufficient trouble to discover the precise misdeeds of these legions of "tiny monsters."

Thus, modern conceptions of accidents, "where death results from the injury" or not, have been as well extended as restricted: extended, in that micro-organisms may be regarded as being introduced into the human system with a sort of momentum, a physical direct impact, an external violence; restricted, in that a disease present precedent to the "accident," that is "an invalid life," may have taken a sudden fatal turn, and also in that many micrococcic infections are in origin not immediately concurrent with, but subsequent to gross physical injuries. The ultimate effects may not be the logical sequence of the primary visible accident; intermediate infection may be the efficient intervening cause of the fatality; death "results from the injury," although the victim did not suffer, in coroners' phrase, "a mortal wound."

The elaboration of the legal definition of "an ACCIDENT" within the meaning of the Workmen's Compensation Act 1897, was effected first in a case which reached the House of Lords in 1903 (*Fenton v. Thorley & Co. Ltd*, H. of L., A. C. 443). It was commented upon then, that *per incuriam* the wording of that Act was faulty and lacking in precision: in the title is the phrase "accidental Injuries"; sect. 1 refers to "personal injury to a workman by accident arising out of and in the course of the employment"; sect. 2, "notice of the accident . . . notice of an injury," "accident causing the injury"; sect. 4, "accident arising"; sect. 9, "personal injury arising." On these verbal, as also on more general grounds, the Law Lords unanimously over-ruled former decisions and established a definition enunciated by Lord Macnaghten, and capable of extensive application:

*The expression "accident" is used in the popular and ordinary sense of the word, as denoting an unlooked-for mishap or an untoward event which is not expected or designed.*

It is noteworthy that the corresponding Belgian Act of



1903 has appended, for purposes of uniformity, a detailed schedule of possible accidents. The shelves of German law libraries are heavy with works upon *Unfallheilkunde*.

Accident compensation cases usually are concluded in the county court, few survive to obtain an official report. Lately a stream of test cases has come before the higher tribunals. The decision of the Law Lords in *Fenton v. Thorley (supra)* is a denial of an alleged former tendency of lower Courts to favour the claim of the injured employee, of higher Courts to protect the employer's pocket from injury. Perhaps in guarding the helpless the law has "waived the quantum of the sin" and has enforced the principle of the responsibility of power. Indeed there are those who affirm that "few accidents are accidental": they arise either from contemptuous familiarity with danger and the carelessness of the unskilled novice, or from the culpable negligence or meanness of the management.

Apart from malingering and self-inflicted or spuriously aggravated injuries, the numerous industrial diseases, zymotic and entozoic infections (as with the employees of a Local Sanitary Authority or rag-sorters), many internal lesions (detached retina, blood-clot in the brain, burst aneurism) and even nervous shock, may have to be considered as possible grounds for a workman's compensation. Some authorities maintain that these illnesses are neither "accidents" nor "injuries." Medical men long have sought a working definition of the word "disease;" lately, forensic necessity has led lawyers to join in the same discussion in so far as trade diseases are concerned. Dr. Thomas Oliver, in the recent edition of his work, *Dangerous Trades*, points out that for compensation to be secured by those suffering from an industrial disease, "it would require to be shown that it was the sole result of the occupation, and that there had been produced a definite pathological lesion of the body." It is said that the wording of The Workmen's Compensation Act

1897 was intended expressly to exclude idiopathic illnesses to which workmen, as others, are subject. During the discussion of the Bill, in the House of Lords, it was declared that "phossy jaw," for example, would not be regarded as an accident within the meaning of that measure, and in the Factory and Workshop Act 1901 occupation diseases are distinguished expressly from accidents.

In excluding trade diseases it must be remembered that it is always uncertain exactly where, at work or at home, and when, at what moment, such an illness is contracted. The Master of the Rolls, in *Steel v. Cammell, Laird & Co. Ltd.* (*infra*), said: "An accident must be something the date of which can be fixed," and this factor seldom can be determined in processes of poisoning, microbic infection, or gradually-developed physical deformity. In *Brintons Ltd. v. Turvey* (118 L. T. 569), Lord Lindley is reported, while stating his grounds for allowing infection by the *anthrax bacillus* as an actionable accident: "I hope that the decision in this case will not be regarded as involving the doctrine that all diseases caught by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen's Compensation Acts." The Act of 1897 never was intended to make employers insurers of their men against all trade risks; if that was intended, much greater caution would be exercised in the choice and location of individual workmen; the weaklings and the diseased would be expelled ruthlessly. It is evident, too, that the men could protect themselves against such known and acknowledged risks by the usual methods of insurance against sickness. The *obiter dictum*, however, may be recalled: "*Scienti non fit injuria* is not a maxim of the English Law." We have travelled very far since Lord Ellenborough ruled, a century ago: "In a Civil Court, the death of a human being could not be complained of as an injury."

In conclusion, whether an injury is sustained by accident

or not, is a mixed question of law and of fact, and herein consists the value of highly skilled medical testimony in the elucidation of the facts of the particular case for the benefit of the judge and jury. In *Warnock v. Glasgow Iron and Steel Co.* ([1904], 6 F. 474), the Court of Session held that the question whether the death of a workman resulted from or has been accelerated by an accident is a pure question of fact. The claimant for compensation is obliged to submit himself to physical examination—but not to treatment—by a medical man, who thus may be enabled to connect the alleged injury with the actual employment of the workman. The Act (Schedule 1, par. 3) allows, in the absence of technical knowledge of the tribunal, the co-operation of official medical assessors or “referees,” whose report is final; there is, however, no power to enforce any suggestion as to active medical or surgical treatment which that report may recommend (*cf.* the Regulation of Railways Act, 1868, s. 26). To this extent the onus of proving whether the condition of the workman, either before or after the alleged accident is, or the conditions of the work are, at fault, must be borne by the medical witnesses in compensation claims.

The following cases are cited as illustrations :

*A. Where the workman has a predisposing bodily infirmity.*

ACCIDENTS :

- 1899. Gout aggravated by unexpected violence of fellow-workman.  
*Lloyd v. Sugg & Co.* 1 Q. B. 486 (C. A.).
- 1900. Hernia recurs while lifting planks (rapidly frozen together).  
*Timmins v. Leeds Forge Co.* 83 L. T. R. 120 (C. A.).
- 1905. Epileptic stevedore falls into a hold.  
*Wilkes v. Dowell & Co. Ltd.* 119 L. T. 33 (C. A.).

NOT ACCIDENTS :

- 1899. Gastric blood-vessels burst while straining (? result of alcoholism). *Hensey v. White.* L. R. [1900], 1 Q. B. 481 (C. A.).
- 1900. Hernia of womb while straining.  
*Roper v. Greenwood.* 83 L. T. R. 471 (C. A.).
- 1901. Internal strain and injury to spinal muscles.  
*Perry v. Baker & Son.* 111 L. T. 209.

B. *Where the workman is blameless.*

ACCIDENTS :

1901. Spinal muscles rupture while lifting 100 lb. beam.  
*Boardman v. Scott & Whitworth.* 85 L. T. R. 502 (C. A.).
1901. Nervous shock, result of another's negligence ; actionable.  
*Dulieu v. White.* (2 K. B. 669)
1902. Raising truck which had left metals ; strain.  
*Williams v. Powell Duffryn Co.* 113 L. J., 196 (C. A.).
1902. (Sc.) Miner strains back.  
*Stewart v. Wilsons & Clyde Coal Co.* 40 Sc. L. R. 80.
1904. Lightning-stroke while exposed, working near building.  
*Andrew v. Failsworth Industrial Society.* 2 K. B. 32  
 (C. A.). Cf. *obiter dictum* to contrary, 38 Sc. L. R. 382.
1905. Woolsorters infected with *B. anthracis*.  
*Turvey v. Brintons Ltd.* April 14, H. of L. [Cf. *Bacon v. Mutual Accident Association*, 1890, 123 N. Y. 304, where death from anthrax was ruled as being not actionable within the policy of insurance.]

C. *Where the workman is probably negligent.*

ACCIDENTS :—"Intervening causes," subsequent infections.

1901. Fatal sepsis, after coal penetrated skin over knee.  
*Thompson v. Ashington Coal Co.* 84 L. T. R. 412 (C. A.).
1902. Crushed toe ; cellulitis in 15 days ; death 10 days later.  
*Dunham v. Clare.* 2 K. B. 292 (C. A.).
1903. Scratch becomes septic.  
*Higgins v. Campbell & Harrison Ltd.* 89 L. T. R. 660 (C. A.).

NOT ACCIDENTS :

1898. 1905. Ingravescient industrial lead colic.  
*Williams v. Duncan.* *The Times*, Nov. 25. Dr. Legge of the Home Office gave evidence.  
*Steel v. Cammell Laird & Co. Ltd.* 119 L. T. 85 (C. A.).
1900. Red-lead and oil poisoned blistered finger.  
*Walker v. Lilleshall Coal Co.* 1 Q. B. 488 (C. A.).
1901. Dermatitis, from washing ink-cans with caustic without gloves.  
*Cheek v. Harmsworth.* *The Times*, Oct. 4.
1905. "Beat" hand and "beat" knee.  
*Marshall v. East Holywell Coal Co.* 119 L. T. 84 (C. A.).  
*Gorley v. Backworth Collieries Co.* 119 L. T. 84 (C. A.).

STANLEY B. ATKINSON.

## V.—SOME EVILS OF THE JUDICATURE ACTS.

LAW and Justice should be synonyms, but this has never been the case., No doubt the reason is to be found in the fallibility of the human mind. The Common law of England being Judge-made law, gradually built up as the result of the opinions of many skilled minds, arrived at after hearing considered arguments for and against propositions by experienced advocates, is founded on principles likely to prove to be correct. Obviously, such a method of fixing the law could only be based on the application of general principles. In practice, carrying out these principles necessarily worked in some instances positive injustice, by reason of their hard and fast rules being too inelastic to meet exceptional cases. This has been the experience of every nation. Aristotle indicated the dilemma as follows, "For of the indefinite the rule also is indefinite."

In this country, an attempt was made to meet the difficulty by establishing a superior Court to reach these cases. This Court was given power to override the principles of Common law when those principles were found to work injustice, and was termed a Court of Equity. Its function was to decide, according to the conscience of the presiding judge, who was originally the Lord Chancellor: thus the Courts which administered the principles of equity were popularly called Chancery Courts, though lawyers termed them Courts of Equity.

The essence of a sound system of law to benefit the general public is, that it should be certain; hence the common maxim amongst lawyers, that a hard case makes bad law. This does not mean that the law in itself is unsound, but that the injustice which would result from its application in the particular instance, is so apparent, that in the desire to administer justice in the exceptional case, an attempt is made to evade the law by seeking to

draw some subtle distinction to avoid deciding according to law. It is impossible for the human mind to provide for every contingency, hence experience has demonstrated that, at a later date, another case arises in which the principle adopted to evade the law has a diametrically opposite effect, and creates injustice; thus, the dilemma indicated by Aristotle comes into operation, owing to the fallibility of the human mind to provide for the infinite. When we attempt to obtain something beyond our powers, we usually fail in accomplishing that within our grasp.

The difficulty in carrying into practice the principles of equity thus imported into our laws, was very forcibly illustrated by Lord Chancellor Selden, when he remarked on a judge, having to decide according to his conscience, that one judge may have a long and another a short conscience, in the same manner as one judge may have a long and another a short foot.

A system of administering justice on opposite principles by two different Courts, created uncertainty and expense, and strong views were expressed that one Court should be granted jurisdiction to decide a case upon the principles which the superior Court could enjoin the inferior Court to follow, without the necessity of specially applying to the superior Court to make such an order. This was attempted by the Common Law Procedure Act 1852, allowing at Common law a defendant to plead a defence to a plaintiff's claim on equitable grounds. It was unnecessary to provide any means for a plaintiff to enforce a purely equitable claim, because he could do that himself by instituting a suit in Chancery for the purpose. This enactment was not deemed sufficient. A feeling spread abroad that a general reform was necessary, and that law and equity should be fused together in some manner, so that one Court might have jurisdiction to grant what was termed substantial justice. This public desire led to the passing of the Judicature Acts,

and the creation of one High Court of Justice. Great expectations were indulged in that the passing of these Acts would not only reduce the cost of a law suit, but bring justice to a poor man's door in such a manner as would place him on an equal footing with his more wealthy opponent.

The Judicature Acts having now been in operation for thirty years, a sufficient period of time has elapsed to form a judgment whether they have effected the object anticipated. Having been in active practice many years under both the old system and the new, we are in a position to make a comparison, and having relinquished practice, with no intention of resuming it, any opinions we may express may be regarded as independent. With all diffidence, we not only venture to suggest that their result has only been to benefit the rich at the expense of the poor, but to make a law suit infinitely more costly and uncertain in its result, and that, in the words of Lord Bacon, the will of the judge masters the law. The only law for the poor to obtain justice is the law of the Medes and Persians, which altereth not. Once allow any opportunity for avoiding its consequences, and the result will be that the rich litigant will benefit at the expense of his poorer antagonist.

In framing laws we cannot obtain perfection: we need only refer to many recent Acts of Parliament to verify this. Once any doubt is allowed to be admitted as to the enforcement of the law, the scales of justice lose their balance, and assist the wealthy at the expense of the poor. When the latter can point to the law, and say to the judge, that is the law, I require you to administer it, his poverty cannot divest him of the rights he is by law entitled to; but once a loop-hole is left for the judge to evade the law, by administering what is called substantial justice, the balance is borne down, by wealth having the means to pay a plausible advocate to put his case before the Court in such manner as

to appeal to the feelings of the judge, who decides upon what he imagines, from the misleading manner in which the case has been put to him, is substantial justice. Our forefathers were wiser in their generation than we are; they restricted a judge's power to that of simply laying down the law, and left substantial justice to be determined not according to the views of a single judge but of those entertained by twelve men acting unanimously within the four corners of the law, as laid down to them by the judge. It is no doubt very hard on a litigant to find that he is in the unfortunate position of being the victim of an injustice, because the enforcement of the law creates justice in ninety-nine cases out of one hundred, and his case happens to be the hundredth, in which it works injustice; but if we band together in society for mutual protection, we must accept the principle that it is necessary for each to give up something to get that protection, and by thus giving up a smaller portion of our rights, we make it absolutely certain that we retain the larger portion, by obtaining the collective strength of society to protect the weak from the strong.

When we meet friends who still continue in practice, conversation naturally turns to legal questions, and we are constantly being told that it is impossible in the present day to advise clients that they may go to law with any reasonable certainty of success. Formerly it was bad enough, but we could say to a client—that is the law and you must put up with it: but now a lawyer has to bear in mind that the Court may not consider the law in any case to be one of substance, and therefore will not follow it. Is not this the cause why such enormous fees are paid to a few favoured advocates who, having the ear of the Court, can persuade it that substantial justice will be carried out by giving their client a verdict. Wealthy individuals regard our judges as being only human, and therefore likely to be led away by the plausible tale of an advocate who, by reason



of this plausibility, can command big fees. Wealth, therefore, is able to command more persuasive powers in its favour than the simple advocacy of a less gifted pleader. When our judges one moment openly profess to decide, not as lawyers but as men of the world, and the next express ignorance of what is going on in the world, we venture to suggest that this is not the best method of giving the public confidence in their judgments.

The practice of administering one system of justice in one Court and a different system in another necessarily led to expense, and the Judicature Acts, by giving one Court the jurisdiction of the two, was undoubtedly a step in the right direction; but instead of proceeding by degrees it was sought to effect the object by one stroke. The statute was the production of an equity lawyer, who, by the system then in vogue, being naturally unacquainted with the practice of the Common law Courts, failed to give due weight to the nature and special requirements of the business transacted in those Courts, which mostly was of a non-contentious character, hence he made the mistake of interfering with their practice as well as with their jurisdiction. His object, apparently, was to evolve one method of transacting business for all cases, but he still retained for the Chancery Division of the Supreme Court the right to have assigned to it the special classes of business it had previously exercised jurisdiction over. Proceedings which before the Judicature Acts were instituted in Chancery, were still to be commenced in that Division of the Supreme Court. We must therefore assume that experience had proved that justice is more certainly obtained by subdivision of jurisdiction. This leads us to suggest that the principle may be carried farther for the public benefit. Members of the Bar, from whom our judges are drawn, now follow the lead of the medical profession, by making certain branches of the law a speciality on their part. One devotes his attention to

Company business, another to Shipping, another to Patents, and so on. We have a special Division of the Court, appropriated to Probate, Divorce, and Admiralty cases, and one for Companies winding-up. Would it not be beneficial to the public to carry this farther, and have special Courts of first instance, and select as judges to preside over these Courts barristers who have made the particular branch of law their especial study. Uniformity would thus be obtained, and valuable time and expense saved to the public, and the number of appeals diminished. A suitor, knowing that an expert judge in the particular branch of law he had invoked, had decided against him, would hesitate in going to the expense of an appeal. Would he not be better satisfied with a decision of Mr. Justice Buckley on Company law, or the late Mr. Justice Grove on Patent law, than with a decision of a judge who had devoted his attention to Real Property law? Subdivision of labour has been found beneficial in other pursuits of life, and the law is pre-eminently a suitable subject to carry out the principle. Barristers turning their attention to a special branch of the law would follow the practice of the Chancery Division, and attach themselves to one particular Court, and then suitors, after paying heavy fees to a counsel to attend to their case, would not find him at a critical moment leaving his Court to attend a case in another Court. All proceedings might still be commenced by process issued in one office, and then allocated in that office to the special judge.

The introduction first of equity and now of substance only represent elements of the infinite. Later on decisions defining what is and what is not substance will only lead to further and possibly greater trouble, and then, no doubt, some other means of enabling the will of the judge to overcome the law will be brought into requisition.

Notwithstanding all the examinations solicitors have now to pass before entering practice, it would appear that they

are less competent than formerly, their functions in practice now apparently consist in arranging their clients' papers together and placing them before counsel to direct them what to do. Has the Judicature Act made proceedings so complicated that they are afraid to stir without taking counsel's opinion? As the Annual Practice now gives a tabular index of reported cases, covering 226 pages averaging forty cases a page, explaining the practice of the High Court, it would appear that this is the case: but while the lawyers have benefited, the public have had to pay for deciding these doubts. There is another alternative, equally as detrimental to the public, and that is, that when solicitors make themselves so proficient in the knowledge of the law, that they are competent to undertake the management of legal questions without reference to counsel, they find they are not adequately remunerated for their trouble. The ignorant solicitor, by instructing counsel, not only is relieved from all responsibility, if he acts under his advice, but gets a higher remuneration for his services. It is true that in many cases the rules of Court provide that the expense of counsel in a suit-at-law is not to be allowed without a certificate that the case is fit for counsel; but unfortunately this certificate is given almost as a matter of course; on one side an old experienced solicitor may appear personally, and on the other a junior barrister attended by the opposing solicitor's office-boy. The case is certified fit for counsel, but the solicitor who attends personally and saves expense gets no personal benefit from so doing: the solicitor who takes no trouble or risk and sends his office boy, being allowed the same fee as the other solicitor, and also the cost of instructions to counsel. If when the solicitor on one side attends personally, the Court were to refuse to certify the case as fit for counsel, and allowed the solicitor who attended without counsel a larger fee than his opponent, who put his client's interests in the hands of

a budding barrister, considerable expense might be saved to suitors. Formerly, the attendance of counsel before a chief clerk was an unheard-of proceeding; now their title is altered to master, it is not uncommon for counsel to attend, an expense which we venture to suggest should be unnecessary. Probably the principal reason why counsel are so much employed is, that it does not pay a solicitor to transact contentious business in the High Court. That part of his profession is similar in principle to that part of a grocer's which consists in selling sugar at a loss to bring other business. Formerly the fees were such as to warrant his employing competent clerks to attend chambers in his absence, but now they are so cut down that second rate clerks are engaged, with the result that when any case out of the routine requires attention it is necessary to employ counsel.

While the Judicature Act has been the means of reducing the remuneration paid to a competent solicitor for transacting contentious business, it has increased that of the black sheep of the profession, who make their living as debt collectors. If two individuals are silly enough not to adjust their differences without appealing to law to do so, a proceeding which benefits neither, it is refined cruelty in order to render it cheaper for those who won't settle their differences to have them fought out in Court, to add costs occasioned by their stupidity to those payable by a poor debtor, whose only misfortune is that he is unable, through illness or other cause over which he had no control, to discharge a debt he is anxious to pay if he had the means. If they name the tune, they cannot complain if they are called upon to pay the piper. The preliminary proceeding of our forefathers was to compel the parties to appear before the Court, when, if the defendant disputed liability, he appeared for the purpose of doing so, and thereupon the plaintiff was called upon to declare the nature of his claim, that the defendant

in like manner, knowing what was demanded of him, might plead the reason he did not admit liability, and thereupon, when the parties came into Court to try the issues, the judge was put in possession of the matters in dispute between the parties, he was called upon to adjust.

Originally, an action was commenced by arresting the defendant under what was termed a writ of *capias ad respondendum*. This was a forcible method of bringing to a defendant's knowledge the fact that a plaintiff was desirous of invoking the assistance of a Court of law: but it rendered it impossible for a defendant, when final judgment was signed against him, to allege that he was unaware of the proceedings. The arrest was in a sense nominal, as a defendant was released on giving bail, which led to the expression straw bail. In those days, when a man's body could be taken to satisfy a final judgment, it was due to him that he should be made aware of the commencement of proceedings which might lead to such an unpleasant result. If the defendant did not appear in Court it was assumed he had no defence, and judgment was given against him, and eight days after that judgment, when the claim was a liquidated demand, if it were not satisfied to the plaintiff's satisfaction, he had a right to issue either a writ of *Capias ad satisfaciendum* or a writ of *Fieri facias ad satisfaciendum* to satisfy his demand: only in the case of the Crown could both be issued concurrently. After the writ of *Capias ad respondendum* was abolished, it was thought that the mere statement of the amount that the plaintiff called on the defendant to pay was insufficient, and that some particulars should be given showing how it was made up, if these particulars could be comprised within three folios. Consequently, when plaintiff required payment of a liquidated amount, a special indorsement, giving particulars of plaintiff's claim, was required to be made on the writ of summons commencing the action. This special indorsement only

entailed extra expense to the poor unfortunate debtor, when he did not dispute that he owed the money, and probably had had the particulars, his only difficulty being want of means to pay it; thus an addition of five shillings was made to the costs for something he did not want, and only added to his burthen. The Judicature Act made a further huge addition of a much worse character, whereby a poor debtor, prepared to admit that he owed the money, was called upon to pay the same amount of costs as if he disputed liability, without giving him any opportunity of avoiding those costs by not appearing to the writ. Before the Judicature Act these costs were only incurred if he appeared to the writ, and by his own proceeding rendered them necessary. It was assumed that by appearing he was desirous of knowing how the plaintiff shaped his cause of action: consequently, the latter had to declare in writing what that cause was; if this caused the defendant expense he alone was to blame by appearing. Now it is imperative for the plaintiff to add a statement of claim in addition to the particulars to the writ, hence the defendant is called upon to pay for this whether he wants it or not. In a disputed case, when the defendant wants the opportunity of demanding a statement of claim beyond that indorsed on the writ, he must issue a summons to obtain it. Thus, in a really contested case, where a defendant takes reasonable precaution to know exactly what claim he has to meet, and desires to have something more exact delivered than the statement on the writ, that he may not be taken by surprise at the trial, two sets of costs are necessary to get it.

The indorsement of the statement of claim on the writ was the natural result of the attempt to fuse the rules of practice at Common law and Chancery without taking into consideration the origin of equity or the effect of one Court administering justice on the fused principles. The fact appears to have escaped attention, that by the fusion

the principles of equity became part and parcel of our Common law. Hence the rules of practice of the High Court should have followed those of the Common law Courts rather than those of Chancery. An action at Common law demanded, as of right, justice, according to law. A suit in equity being an appeal to the judge to decide, according to his conscience, was instituted by presenting a petition to the Lord Chancellor termed a bill of complaint, in which the claims for relief were required to be set forth in detail for the defendant to answer, and on the filing of this bill of complaint a subpoena, which answered to the Common law writ of summons, was issued, calling upon the defendant to appear and show cause why relief should not be granted. For instance, if the penalty payable from A. to B. on a bond to secure fifty pounds were one hundred pounds, it was inequitable that more than fifty pounds should be recoverable on that bond by B., and the Court of Chancery would give relief on a bill of complaint being filed. When the Judicature Act fused law and equity there ceased to be any need for any bill of complaint, as B. could not recover more than fifty pounds: it was, therefore, unreasonable that the rules of practice in the Court administering these fused principles should call upon B. to incur costs for something he was not entitled to claim, or A. to pay costs for something B. could not recover; or, worse still, if C. instituted an action in the High Court against D. to recover one hundred pounds for money lent over which no equity rules would prevail, that D. should be compelled to pay costs for particulars of something C. never could have claimed of him either at law or in equity.

Previously to the passing of the Judicature Acts there existed a special class of legal practitioners called pleaders, who were not called to the Bar, and whose particular function was to prepare pleadings in a Common law action,

for which they were paid small fees ranging from seven shillings and sixpence to one guinea, but very rarely more. In ordinary cases the attorney prepared his own pleadings. This class has disappeared, and pleadings are now prepared by barristers, who usually are paid from one guinea upwards, and also half-a-crown for their clerk, whilst the solicitor is allowed a fee of three shillings and fourpence attending to pay the money. Neither the clerk's fee nor the attendance was previously chargeable. The practical effect of this supposed saving of expense is that the poor unfortunate debtor, whose only desire is to go cap-in-hand to his creditor, is treated as a truculent debtor who wishes to give his creditor all the trouble he can. This is exemplified by comparing the amount of costs now endorsed on a writ and the amount endorsed before the Judicature Act. Formerly, on payment of debt and costs within four days it was two guineas—now it is three guineas. The cost of a judgment by default in town was three pounds eight shillings; now between twenty and fifty pounds it is four pounds; and above fifty pounds, four pounds fourteen shillings. These amounts included the charge for personal service of the writ. Further, when the allowance was smaller, greater effort was required to effect personal service, as judgment could only be signed on making a special application giving evidence that knowledge of the writ had been brought to the notice of the defendant, or that he was keeping out of the way to avoid service, thereby making it the action of the defendant if extra expense were incurred. The rule under the Judicature Act provides that if a plaintiff is unable to effect prompt service, an order for substituted service may be obtained, thus adding to the costs, although there may be no desire on the part of the defendant to avoid service. The practice is to grant an order for substituted service when two appointments are made for the purpose. A careless servant may neglect to inform the defendant, or he may be away and



unable to attend, but, notwithstanding, he is saddled with the costs. This opens the door to pettifogging solicitors increasing costs unnecessarily. A negligent servant, in order to shield herself, would probably say she had delivered the message when she had forgotten it. Why should defendant be saddled with the costs? No skill is required in serving a writ. In the majority of cases the process server walks in and simply puts the document in the defendant's hand. Formerly, when personal service was necessary, the rough was taken with the smooth.

This leads us to inquire whether members of a profession, where honour is supposed to rule supreme, should be degraded by making them bailiffs, to earn their livelihood by preying on the vitals of the unfortunate. Does it not encourage a low type of individual to enter the profession, that they may obtain a position to extort unfair payments for costs from poor unfortunates who get in their clutches. How often do we see in the Press that a man ascribes his bankruptcy to law costs. Would it not be better to save these costs, and keep the man on his legs, by preventing their being incurred? The effect of the present system of enforcing payment of debts is to benefit the rapacious single creditor at the expense of the general body. Where is the wisdom in seeking to compel a man to pay a sum of money by calling upon him to pay something additional? As a general rule, the average man pays if he can. Non-payment destroys the credit, which is necessary for him to carry on his business: he has therefore every incentive to pay. Law should provide for the general course of human nature, not for the exceptions thereto. The result is that the honest unfortunate debtor has to make up for the shortcomings of the dishonest scoundrel who pays nobody: and the real sufferers are those creditors who act in the interests of the general body by not forcing payment to their detriment. We read of a case of over

one hundred Petitions in Bankruptcy having been presented against a single debtor before he was adjudicated bankrupt; the costs of these, irrespective of his own solicitors' costs, must have been over two thousand pounds. Pressed in this manner, how could the debtor be expected to survive? Is it not a disgrace to the acumen of our legal luminaries that they cannot devise some means to stop such proceedings?

Proceedings in the County Court point to improvements in the system of recovering debts which may be extended for the benefit of all parties. Is it not a relic of past ages, when a debtor's body was capable of being seized as security for a debt, that the creditor is allowed to issue execution as a matter of course, without regard to the interests of other creditors, and without giving the debtor an opportunity of demonstrating that such a proceeding is unfair to the interests of all parties. Before a creditor is allowed to issue execution, and thereby destroy a debtor's means of paying other creditors, ought it not to be necessary for him to obtain the sanction of some public authority, who should hear what the debtor has to say, unless special evidence is adduced to him that prompt action is necessary? The rules under the Judicature Act allow him to obtain prompt service of a writ: therefore they might give him power to issue speedy execution where necessary. The debtor may be able to give the Court sound reasons why execution should not issue. A murderess has a right to have execution stayed, if she is pregnant, in the interest of the child, who is an innocent party. Why should not the debtor have a like right to apply for a stay in the interests of his other creditors? Why should a debtor be handed over to the tender mercy of a vindictive creditor? Does not this enable money lenders to relentlessly prey on their victims?

Mere debt collecting is purely non-contentious business: could it not be separated from contentious business? Is

there any reason why it should be necessary for a wholesale firm to employ a solicitor for the purpose, or be compelled to go to the High Court in the first instance? Employing a solicitor simply to recover an undisputed debt, is like calling in a surgeon to pare the finger-nails. Ought any writ for the recovery of a debt to be issued in the High Court without consent of the parties, the production of an undertaking from a solicitor to appear, or of a warrant of an inferior Court, say a County Court, that the institution of the action is necessary? To get that warrant, all that should be necessary might be to fill up prescribed forms and leave them, with a small fee, with an official of the inferior Court, whose duty it should be to send a registered letter to the debtor, calling upon him to return to the Court either of two enclosed forms, one of them disputing liability, the other admitting it. On receipt of the former, a warrant to the High Court to issue a writ would be issued; this proceeding not destroying the right to apply for judgment under Order XIV. On the other hand, if defendant admitted the debt, the inferior Court might call upon him to show cause why execution should not issue. If with the admission he made a proposal for payment to the creditor, the Court should send that proposal to the plaintiff, and, if satisfactory, no further proceedings ought to be taken unless defendant failed to perform his part; if not satisfactory, the Court might summon each party before it, and should have power to give time for payment or to order immediate execution, as justice demands. Other creditors of the debtor should have the right to appear, and object to one creditor seizing the debtor's property in execution for the personal benefit of that creditor to the detriment of the general body of creditors. As the law stands at present, a vindictive creditor might instruct the sheriff to sell up a man's home, although two or three days after he would be coming into possession of a sum of money sufficient to

pay the debt several times over. The only remedy to stop such a proceeding is the expensive one of presenting a Petition in Bankruptcy. Further, no Petition in Bankruptcy should be allowed to be presented without a like warrant from the inferior Court, that its presentation would be for the benefit of the general body of creditors; power being given to the Bankruptcy Court to accept a Petition from the debtor himself, if satisfied that the Petition will benefit the general body. Complaint is made of the great cost of officialism in Bankruptcy. Is not the cause of this that when there are assets capable of being realised the creditors take the estate out of Bankruptcy and administer it by their own agent? When it is found there are insufficient assets to pay the cost of proceedings incurred by the Official Receiver, why should the State be called upon to pay the costs of a bankruptcy, frequently instituted only for vindictive or improper purposes, with the full knowledge that there are no assets? In a recent law suit it transpired that the bankrupt had written that he was penniless. When notice has thus been given, ought not the Court to require evidence that there is some prospect of assets being realised before making an adjudication, and thereby causing the State to incur expense?

ANTHONY PULBROOK.

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## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### The Russo-Japanese War.

THE success of the American President in inducing the belligerents in the Eastern war to consent to a meeting between their plenipotentiaries (now already on their way to America for that purpose), if it does not bring

about a cessation of hostilities, is at all events a powerful factor for peace; and it is known that such peace is a necessary preliminary to the general International Conference, called by Mr. Roosevelt, to carry on the work of the Hague Conference of 1899, at which the burning questions of neutrality and contraband are intended to be discussed. No better object lesson of the necessity of an international understanding with regard to neutrality can be furnished than the voyage of the Russian Baltic Fleet, from its start, last October, to its annihilation by the Japanese, in May. That voyage was only made possible by the constant supplies of coal furnished by German and other enterprise to the fleet at different stages of its journey, a source of profit closed to British shipowners by the official interpretation of our Foreign Enlistment Act, and by its protracted stay in or near French territorial waters in Madagascar and Indo-China, in spite of official orders to the contrary; and if the expedition had met with success instead of disaster, the fact of that help from neutral traders or near neutral waters might have led to an estrangement between Japan and these Powers. One of the controversies with regard to the law of contraband, namely, whether belligerent warships have the right to destroy neutral ships carrying contraband, on the plea of necessity and inability to bring the prize into port, which will no doubt receive consideration at such Conference, has been revived by the sinking of the British *St. Kilda* with coal on board, and the *Ikhona* with a cargo of rice, by Russian cruisers (voluntary and other), in spite of the explicit undertaking of the Russian Government that the action taken against the *Knight Commander* (for which no compensation has yet been paid) would not be renewed: and it is to be noted, so far as Japan is concerned, that in the case of the *Nigretia* carrying a cargo of kerosene to Vladivostock, the presence on board of a number of Russian

officers previously captured by the Japanese and given parole on condition of not taking part again in the war, caused her condemnation and that of her cargo as prize.

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The situation created by the visit of the mutinous Russian man-of-war *Kniaz Potemkin* to the neutral Roumanian port of Constanza has not had many precedents: and the Roumanian authorities are entitled to considerable credit for their promptitude and judgment in dealing with it. The port officials refused to furnish provisions or coals to the ship, and intimated that the seamen, if landed, would be regarded only as foreign deserters and be given their liberty on being completely disarmed and surrendering the ship. This course has been adopted by the ship's crew (July 10), and the ship, after flying the Roumanian flag for twenty-four hours, has been handed over to the Russian Fleet in pursuit of it. It is, therefore, no longer necessary to consider the obligations and rights of neutrals, whether governments or individuals, towards a warship in the hands of mutineers, unless the example of this ship is followed by other units or a whole squadron. No doubt, following the precedents established by the revolution in the Spanish Fleet at Carthagena, in 1873, and the views expressed in the *Huascar Case*, 1877 (see this Magazine, Vol. XXVIII, 89), in view of the declaration made by the crew of the *Kniaz Potemkin* that they were at war with Russia only, so long as they committed no violence against ships or property other than those of their own country, no neutral Power would have interfered with her or treated her as a pirate. Indeed, as long as she flew the Russian flag and no intimation was given by the Russian Government that she was other than a Russian public ship, other Powers could not treat her status as otherwise. The action of the Roumanian Government was strictly within their rights and did not infringe Russian susceptibilities. It will be remembered

that juristic opinion within the last few years, in dealing with the rights of insurgent organisations and the duties of foreign States towards them (Neuchâtel, Rules of the Institute 1900), has rather drawn the line in favour of the rights of insurgents and respecting the rights of their established sovereign governments, until an unmistakable *de facto* position is assured to the insurgent organisation: and *a fortiori*, this view would prevail in the case of an isolated rebellious unit. The restoration of the ship to the authority recognised as proper by the action of the crew in giving her up should raise no question of neutral duty. It is curious that we have a historical parallel of our own in the mutiny of the Fleet at the Nore in 1797, an offence against discipline which was wiped out by the victory won by those ships under Admiral Duncan at Camperdown shortly afterwards.

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### A New International Arbitration Treaty.

The Arbitration Treaty between Russia and Denmark, signed on March 1 (February 16) last, deserves attention as not following exactly the lines of its forerunners, but rather presenting new features which may be reproduced in future treaties. Expressly stating itself to be an application of Arts. 15—19 of the Hague Convention, it provides for the submission to arbitration of all disputes arising between the two parties which do not touch the independence or vital interests, or the exercise of sovereignty by either party, when a friendly solution has not been obtained by direct diplomatic negotiation. In the following kinds of disputes such submission is obligatory (each party, however, being the judge of whether the case in question falls within these classes): (a) interpretation or application of conventions relating to private international law, the *régime* of commercial and industrial associations, matters of procedure, whether civil or penal, or extradition; (b)

pecuniary claims where the obligation to pay an indemnity or any other kind of payment is recognised in principle by the two parties. The sphere of obligatory arbitration is thus being steadily extended by these special treaties, all the more so because they are not of the same form, and any opposition to them as likely to interfere with the general resort to the Hague Tribunal is rapidly disappearing. • •

### Norway and Sweden. •

The dissolution of the union between Norway and Sweden, if the present *de facto* position becomes also a *de jure* one, will be only another example (like that afforded by the similar case of Holland and Belgium) of the non-permanence of artificial unions between nations whose individual national feelings are too strong for them to coalesce. Both these unions were part of the general scheme of re-arrangement set up by the leading Powers of Europe at the close of the Napoleonic era; but the partnership of Holland and Belgium only lasted till 1830. Up to 1814 Norway was united with Denmark, and when her union with Sweden was carried out she discharged honourably her proportion of the joint liabilities of the Dano-Norwegian kingdom under the provisions of a treaty between the three Scandinavian Powers in 1819. Although the Act of Union declares that "the peoples of Scandinavia were happily united by a new political tie, which had been formed not by force of arms but by conviction, which can and ought only to be maintained by mutual recognition of the legitimate rights of the peoples for the maintenance of their common throne," the union was, nevertheless, brought about by the pressure not of Sweden only, but of the British fleet blockading the Norwegian ports; a proceeding which was strongly condemned by such international authorities as Lord Grenville and Sir James Mackintosh, and the justification of which by its authors was that it



was "part of the provisions for a general treaty of peace, which had for its object the re-establishment and pacification of Europe."

The present action of the Norwegian Parliament in authorising the Government "to exercise the power belonging to the King" bases itself upon the ground that the King has acted unconstitutionally in disregarding the opinion of the Norwegian Parliament with regard to a Bill creating a separate consular service for Norway. This was demanded first in 1891, and after being accepted in principle, and being referred to a commission, was rendered abortive owing to Sweden insisting that the Norwegian consuls should be subject to the Swedish Foreign Minister. From the international aspect of the question the consent of Sweden certainly seems to be required for the separation. It is to be hoped (and it seems likely) that the only question on which there is likely to be difference of opinion is the terms on which that separation is to take place, and the terms said to be suggested by a Swedish representative certainly point in the direction of a friendly parting and the maintenance of a friendly feeling in accordance with the international spirit of the times, *e.g.*, the settlement of future differences by arbitration, the payment by Norway of her share of the joint diplomatic and consular expenses up to the date of the separation, free trade between the two kingdoms and a mutual most favoured nation treatment, and demolition of the fortifications on the joint frontier. It must be remembered that from the outset the two kingdoms have only had a King and external representatives in common: their naval and military services, their flags, and all branches of their governments have been separate and distinct.

The interests of Great Britain in the question are principally concerned with the effect of the new situation on the Treaty of 1855, by which she and France guaranteed

the integrity of Norway and Sweden on condition of their not ceding or exchanging territory with Russia, or allowing her any fishing or pasturing rights on their territories. It is to be noticed that in its external relations each kingdom has been an international separate entity according to the provision in the Act of Union of 1815, that "the kingdom of Norway should form an independent, indivisible and inalienable kingdom reunited with Sweden under one King." Both nations are joint parties to many important international engagements, such as the Geneva and Hague Conventions, and such dissimilar conventions as the maintenance of the succession to the throne of Denmark (1852) and the upkeep of the Cape Spartel lighthouse with Morocco (1865): but each has treaties concerning itself only with other Powers, *e.g.*, Sweden is a party to the Sugar Convention of 1902, and the Hague Private International Law Convention of 1902, and it has a treaty with Hungary (a member of a similar union) with regard to mutual communication of judicial acts, while Norway has a separate treaty with Holland (1901), and one with ourselves with regard to telegraphic communication, wireless and submarine, between the two countries. If the treaties with both nations, such as our treaty of guarantee of 1855, are in this double form, it will be a question whether the ceasing of their partnership alters the position of the guarantors, though Mr. Balfour has intimated in Parliament that in its event the matter will require consideration.

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### **The Meaning of Trade Equalities in Treaties.**

The complaints of British subjects against the heavy tolls levied on shipping, and the duty imposed on the export of copra in the Marshall and Caroline Islands by the German company administering those islands, as being an infraction of the Convention of 1886, have resulted in an

assurance being given to Lord Lansdowne that the German Government will terminate the agreement made by them with the company on March 31, 1906, though not admitting that this privileged position accorded to the company constituted a breach of the treaty, as the tolls and duties fell on German and British shipping and commerce equally. The Convention in question (April 10, 1816) is preceded by an agreement of April 6 of the same year, drawing a conventional line of demarcation between the spheres of German and British influence in the Western Pacific. The line traverses New Guinea, divides the Solomon Islands and parts the Marshall Islands (which are left to Germany) from the Gilbert Islands (which are British), Germany taking all to the west, north-west, and north of it, and Great Britain all to the east, south-east, and south of it; but the Convention was expressly excluded from applying to the Navigation Islands (Samoa), dealt with by treaty between Great Britain, Germany and the United States, or to the Friendly Islands, dealt with by treaty between Great Britain and Germany, or to Niné Savage Islands, which group was to continue to form a neutral region; or to islands and places in the Western Pacific being under the sovereignty or protection of any other power. By the convention Great Britain and Germany granted each other reciprocal freedom of trade and commerce in their respective possessions in the Western Pacific: the subjects of each Power having the right to settle and acquire property of any kind in the possessions and protectorates of the other, to engage in all descriptions of trade and in professions there, subject to the same conditions and laws, and to enjoy the same protection and privileges as the subjects of the other State. The question whether a preferential position for considerations of State policy, granted to a native subject in the territory subject to the influence and jurisdiction of one of the contracting

Powers, is an infringement of the stipulation for equality of treatment between subjects of either State, will always be a difficult one. It will be remembered that this question has taken an acute form in the diplomatic correspondence between Great Britain and the Congo State, whose Government had granted valuable trading concessions for the performance of certain public duties, and monopolistic grants of land (see this Magazine, Vol. XXIX, 385); and though the right to grant such privileges can be justified by the strict letter of the agreement, it seems proper to treat this as really a question of degree, and if monopolies are granted amounting to real exclusion of other commercial enterprises on a scale which produces a general and substantial difference in position between such concessionaries and others, that is an inequality of treatment which gives the other party legitimate practical cause for complaint.

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### **An American Branch of the International Law Association.**

The International Law Association has received the following interesting communication from Professor Charles Noble Gregory, Dean of the Faculty of Law of Iowa State University (June 13th):

"I am just back from New York and from attending and taking part in the 11th Annual Lake Mohonk Conference on International Arbitration. There were nearly four hundred invited guests present at the conference. Judge George Gray presided, and the session extended over three days, including May 31st, and June 1st and 2nd.

"One of the best things done there, was a very admirable statement of the North Sea incident by Professor John Basset Moore of Columbia University. He characterised the proposition of Great Britain as remarkable, "because it was in effect an offer of arbitration coming from the aggrieved party; because it was made in a time of great

popular excitement; and because it was a striking exemplification of the peaceful settlement of international disputes.

"A special meeting of those interested in International law was held, presided over by Hon. Oscar Straus, formerly minister to Constantinople. Dean Kirchway, of Columbia University, in moving that it was desirable to form an American International law association, stated that the movement took its origin in a letter from Dean Gregory, pointing out the desirability of establishing a periodical printed in this country, devoted exclusively to International law. Dean Gregory supported Dean Kirchway in the discussion, and the motion was carried, and a committee on organisation was appointed, headed by the Hon. David J. Brewer, Justice of the Supreme Court of the United States, and including Judge Gray, Mr. Straus, Hon. J. W. Foster, Ex-Secretary of State, Hon. Andrew D. White, formerly ambassador to Berlin, Hon. J. M. Dickinson, Chief Counsel for the United States before the Alaskan Commission, President Angell, President of the University of Michigan, W. W. Marrow, John W. Griggs, John Basset Moore, Theodore S. Woolsey, George W. Kirchway, I. S. Rowe, James D. Scott, Everett P. Wheeler, Robert Lansing, Chandler P. Anderson, George G. Wilson, Charles Henry Butler, James H. Beall, Jr., and Charles Noble Gregory. The organisation hopes to found and maintain a periodical devoted to International law. The project was strongly indorsed before the conference by Judge Gray and Mr. Straus, as a most important advance movement in behalf of international peace. At the last session, by invitation of the committee of management, the conference was addressed by Governor Utter of Rhode Island; by Mr. Uchida, Japanese Consul-General at New York; by Dean Gregory, Prof. Bracq, Chief Justice Moore of Michigan, Senor Gamboa of Mexico, and others."

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### The Unification of Maritime Law. .

It seems as if at last, as the result of the continuous pressure kept up by the leaders of the movement in favour of unification of Maritime law, the British Government will give its official countenance to the diplomatic conference which is considering the draft treaties on collision and salvage prepared by the International Maritime Committee, and send representatives to it when it reopens in September at Brussels. On June 30, in the House of Lords, Lord Muskerry called attention to the resolution passed at the recent conference at Liverpool in favour of the British Government being officially represented at the adjourned Brussels Conference, and he received the weighty support of the Lord Chief Justice, whose interest and belief in the genuine necessity of the movement for unification is well known; and Lord Lansdowne, after admitting that "the deputation that he received at the Foreign Office on this subject last year was one of the most representative and influential that ever waited on a British Minister," undertook, after he had received fuller accounts of the proceedings of the Liverpool Conference, to examine the codes approved at this conference with the desire that the interests of Great Britain might be represented, if not officially, at any rate in some adequate manner, at some subsequent meeting of the Belgian Conference. (*Times*, July 1.)

The Liverpool Conference itself, which was held June 14—17, though it had a pretty full programme, did not really do much beyond putting the seal of approval of the British shipping interest not only on the proposals already approved at the official Brussels Conference, but also on the larger questions of limitation of shipowners' liability, etc., already fully discussed by the International Maritime Committee (see this Magazine, November, 1904, Vol. XXX, 29). It was

noticeable at the Liverpool Conference that the voices of commercial men, rather than those of lawyers, were the most numerous. This is a change from the character of some of the "previous meetings organised by the Committee, and indicates the deeper root that the movement is taking. Among the fresh arguments adduced in favour of combining the British and Continental systems of limiting shipowners' liability, as resolved at the Amsterdam Conference of last September, it was shown that the limit of liability fixed by our law (£8 a ton) is probably nearly double that which prevails under the Continental system of taking the value of the ship after collision, and the British shipowner is thus at a serious disadvantage. The opinion of the conference did not, however, favour the view adopted in Amsterdam of allowing the shipowner to limit his liability in respect of contractual engagements made by the master, *e.g.*, for necessities or carriage of cargo; and the Continental representatives agreed to accept instead, the British rule of limitation only in cases of improper navigation, as in the Merchant Shipping Act.

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## CONFLICT OF LAWS.

### Marriage Settlement.

In *Sawrey Cookson v. Sawrey Cookson's Trustees* (13 Scots L. T. 160), the question for decision was whether an antenuptial settlement executed by an intended wife, a Scotch lady, in Scotland previously to her marriage with a domiciled Englishman, and after marriage ratified by the spouses, both that execution and that ratification being declared to be effected by the parties in error caused by misrepresentation, should be governed by Scotch or by English law. The property of the wife so settled was entirely moveable, and the settlement secured the income of it to the wife for her life, then the husband was to have it for his

life if he survived, and at the death of the survivor the whole was to pass under the directions of the wife, or failing such, was to pass to the wife's legal representatives according to the law of Scotland, and it contained no clause declaring it irrevocable. It was argued for the wife and husband, who claimed the whole fund from the trustees as held under a revocable trust, that the settlement was revocable before ratification by the law of Scotland which must govern the question, the deed being in Scotch form, executed by a domiciled Scotchwoman, creating a trust to be administered in Scotland, and containing provisions such as that all life rent provisions should be purely alimentary, and the ratification was also revocable as being merely ancillary to it. The trustees, on the other hand, contended that the law of England applied as the law of the matrimonial domicile, and by it the settlement was irrevocable, and by either Scotch or English law the ratification was a bar to revocation. The Scottish Court held that the law of Scotland governed the settlement which was revocable: that while the ratification stood, the settlement and ratification together formed a valid post-nuptial marriage settlement not revocable by Scotch law: but the English law governed the question whether the ratification was revocable or not, and a proof of the English law applicable was ordered both as to this and as to the settlement.

In *Kelly v. Selwyn* (*Law Journal*, April 15), a husband, by deed made in 1891, and in New York where he was domiciled, assigned to his wife all his reversionary share in his father's property. That property was in England in the hands of English trustees and invested in English securities, and no notice of such assignment was given to the trustees till 1903. By deed, in 1894, the same person assigned all his interest in his father's property by way of mortgage to the plaintiff, and notice of it was at once



given to the trustees. By the law of New York, notice to trustees is not necessary to complete title on the assignment of a chose in action or a reversionary interest in personalty. It was held that the fund was an English trust fund, and though the deed of 1891 was valid by the law of New York without notice, the priorities must be decided by English law, and consequently the subsequent assignment, with notice, was to be preferred to the earlier assignment without notice.

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In *Det Freneda Dampskib Selskab v. Somerville* (12 Scots L. T. 812), a point was raised which has already been submitted to English Courts and has been answered in the negative, namely, whether a foreign ship can make the deduction of crew space from her gross tonnage for limiting her liability (M. S. A. 1894, ss. 84 and 503); *The Cathay* (L. R. [1897], P. 76), which is allowed to British ships. The Scotch Court adopted the English view, and, in a case of collision between a British and a Danish ship, decided that the latter could not make the deduction claimed.

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In another case, *The Circe* (*Law Journal*, June 3), another point of shipping law was raised. A collision had taken place between a Spanish and a French ship, and the action brought in respect of it was settled on the footing that both ships were to blame. In the collision the Spanish ship was sunk and five seamen lost their lives. Under a Spanish statute relating to employers' liability for accidental damage to their servants, the Spanish shipowners were obliged to pay compensation to the seamen's families: and they claimed repayment of half of this sum from the French ship on the principle of division of loss. The Admiralty Court held that their claim could not be made under English Admiralty law, as such a loss did not come within

the purview of the rule allowing division of loss, and the Spanish law in question was more of the nature of a Workmen's Compensation Act imposing a liability irrespective of whether the employer was negligent or not.

In *Bates v. Bates* (*ibid.*), a problem of jurisdiction in divorce, arising out of several changes of domicile, was presented to the Court. A woman married in England a man domiciled there, who afterwards sued for a divorce here and failed. He then took up his residence in the United States and acquired a domicile there. The wife, after the divorce proceedings here, lived in this country for a time, then went to the United States and got a divorce there from her husband on the ground of his adultery (not a ground of divorce by our law). She then returned to England with another man who was cognisant of all the proceedings, and went out with him to the United States and married him there, and they then lived together in England. Divorce proceedings were afterwards taken between these latter persons in England, and it was held that the American divorce was valid, there being no such want of domicile or residence shown by the wife (petitioner) in the American divorce proceedings as ousted the jurisdiction of the American Court, and as the former husband's domicile was American, it was immaterial that the divorce went on a ground not valid by English law. Farther, the fact that the English proceedings were not disclosed to the American Court was treated as not affecting the validity of its jurisdiction, though it might go to the merits of the case: and the Court decided that it would not be justified on this ground only in refusing to recognise a decree on which both parties had acted; and both parties being in the eye of English law domiciled here, they should not be compelled to resort to America to have the validity of their marriage tried in that country merely because it had been celebrated there.

G. G. P.

## VII.—NOTES ON RECENT CASES (ENGLISH).

**I**N *Embericos v. Anglo-Austrian Bank* (L. R. [1905], 1 K. B. 667; 92 L. T. R. 305), the Court of Appeal have affirmed the decision of the Court below, noted in our issue of February last (Vol. XXX, No. 335, p. 223); but the case is perhaps deserving of further mention. The essential facts are, shortly, that a cheque drawn abroad on a London bank to the order of the plaintiffs was, after being indorsed by them to a firm in London, stolen abroad and the signature of the indorsee forged. A bank in Vienna discounted the cheque, having taken the precaution to ascertain from the drawer that it was duly issued, and they then indorsed it to the defendants who cashed it at the London bank at which it was made payable.

In English law, of course, the Vienna bank could have derived no title under the forged indorsement, for sect. 24 of the Bills of Exchange Act 1882, continuing the old law of *Johnson v. Windle*, 3 Bing. N. C. 229, and many other cases, makes the forged signature "wholly inoperative." But in Austrian law a cheque bought *bonâ fide*, without negligence and for value, entitles the holder to the proceeds against the whole world, notwithstanding that the cheque had been previously stolen and the indorsement forged. And by sect. 72, sub-sect. 2, of the Act, the interpretation of an indorsement (which Walton, J., held, "means the legal effect of the transfer by indorsement"), is to be determined by the law of the place where the contract is made. The action against the defendants for wrongful conversion failed. But though the decision went no further than to throw the burden on to the payee, it is a logical inference, and Vaughan Williams, L.J., expressed the view, that in similar circumstances the title by such an indorsement is good against drawer and acceptors.

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*Vinden v. Hughes* (L. R. [1905], 1 K. B. 795; 74, L. J. R. (K. B.) 410); is another case of forged indorsement, but falling under a different section of the Bills of Exchange Act. An employer sometimes signed cheques to order in blank, and left them for his clerk to fill in subsequently. At other times the clerk obtained his signature to cheques to order in the names of his creditors, but for amounts other than those due to them. Some of these cheques, but whether any of those said to have been signed in blank does not appear in the report, the clerk stole, and, having forged or supplied the indorsements, obtained cash from the defendant, a tradesman with whom he dealt.

If the sole question had been whether the defendant was a holder for value, he would probably have been freed from liability, for there was no suggestion that he had acted otherwise than in good faith. So would he if the payees had been fictitious persons, but Warrington, J., held, on the ground that the employer had every reason to believe that the cheques were drawn in the ordinary course, that the payees were not fictitious or non-existing persons within the meaning of sect. 7, sub-sect. 3, and that, as the cheques could not be treated as payable to bearer, that defendant was liable.

But the judgment, as reported, does not seem to be fully satisfying. It may be sustained in law that, where a man in good faith signs a cheque with the name filled in, he indicates the payee though the amount filled in may not agree with that which is the payee's due. But this could hardly apply to cheques signed in blank and afterwards filled up in favour of persons who, though their names corresponded with those of real persons, might have no claim at all against the drawer, or a claim different from that covered by the cheque.

The decision noted in our issue of February last (Vol. XXX, No. 335, p. 223), in *Hermann v. Charlesworth*, has been reversed by the Court of Appeal (L. R. [1905], 2 K. B., 123; 74 L. J. R. 620), which has allowed a lady to recover money paid to an agent as consideration for introductions to persons of the opposite sex (more or less desirable) with the object of matrimony. And the decision enlarges what was the accepted law upon the subject of marriage brokerage, for it was considered that the prohibited point was the bringing about, for reward, marriage with one particular person. But the Master of the Rolls has held that there is no distinction between a contract for such a purpose relating to one person and a contract relating to a whole class, for the root of illegality is the introduction of a money payment into what should be free from the mercenary motives of agents.

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A local Act of George III fixed a rate upon all houses within the parish of St. Paul, Covent Garden, to be paid by the respective occupiers. Certain dwellings have been converted into warehouses, and the Court, in *Lewin v. End* and *Lewin v. Civil Service Supply Association Limited* (L. R. [1905], 1 K. B., 669; 92 L. T. R., 486; 74 L. J. R., 406), held that, as the converted houses could not, without structural alterations, again be made fit for dwellings, they were freed from the rate. This was on the strength of *Surman v. Darley* (14 M. & W. 181), by which Covent Garden Theatre was exempted, and the Court followed the case more apparently from its antiquity than from its merits. From the business nature of the locality it is likely that many other residences will be turned into warehouses, and necessarily, the effect of the case will be to throw an increasing burden upon the houses that retain their original character. The intention of the statute was probably to exact contribution from all houses, and as the changes made

in the use to which the houses are put are made for the greater profit of the holders, it would seem fair that the rate should be upon all house property, irrespective of the use which is made of the premises.

Section 18 of the Sale of Goods Act states many conditions under which a transfer of goods takes place from the seller to the buyer when there is only a contract for sale. *Weiner v. Gill* and the same *v. Smith* (L. R. [1905], 2 K. B. 173) are cases which come under rule 4 of the section, and in both the plaintiff supplied a contract note which expressed that the goods were delivered "on approbation; on sale for cash only or return," and which further claimed that the goods were to remain his property until they were settled for or charged. The person to whom they were delivered, delivered them to another who professed to have a customer for them, but who in fact pawned them; and the action was for delivery up of the goods by the defendants the pawnbrokers. The terms of the contract note differ from the terms of the rule, in the words "for cash only"; but these are important words, for they prevented the property in the goods passing from the seller, inasmuch as the person to whom they were delivered had not paid cash, the one act necessary for "adopting the transaction" according to rule 4 (A). In coming to this conclusion, Bray, J., expressed the opinion that the judges in a recent Scotch case of *Bryce v. Ehrmann*, were not right in construing as they did a contract note, the terms of which were very like those in the present case. Bray, J., further held that the plaintiff was not estopped by anything that he had done, and as the pawnbrokers had made no inquiries about the title of the person offering the pledges, judgment was in both cases given for the plaintiff. The decision will probably stop a good deal of illegal pawning of valuables.

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When a debtor does not appropriate a payment which he makes to his creditor, the creditor may appropriate it; and he may do so, Lord Macnaghten said, in *The Mecca* (L. R. [1897], A. C. 286), up to the last moment. This has been reached in *Seymour v. Pickett* (L. R. [1905], 1 K. B. 715; 92 L. T. R. 519), where the creditor was allowed to make his election in the witness box.

T. J. B.

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The decision of the House of Lords on the appeal in *In re Hanbury, Hanbury v. Fisher* (L. R. [1904], 1 Ch. 415) has now been reported (*Comiskey v. Bowring Hanbury* (L. R. [1905], A. C. 84)). It is completely in accord with our comments on the decision of the Court of Appeal in our issue of May 1904, p. 344. We there expressed our strong opinion that the dissenting judgment of Cozens-Hardy, L.J., was right, and that judgment—Lord Lindley alone dissenting—has been affirmed by the highest and most learned and able Court in the Empire. Of all the judgments delivered in the House of Lords, we like that of Lord Macnaghten best. He simply adopted the judgment of Cozens-Hardy, L.J. That judgment was to our mind absolutely right and entirely conclusive.

We have over and over again had occasion to refer to the fact that, where conclusions of facts are important, the decisions of a Common law judge are much more to be relied upon than those of a Chancery judge. This is only natural, since in three cases out of four a Common law judge's business is to decide points of fact. Moreover, the practice of addressing juries enables him to distinguish what is matter of fact from what is matter of law in a manner that an equity judge, who decides both on the facts and the law, has no need to do, and hence no ability in doing. On the other hand, equity judges are accustomed to the inter-

pretation of written instruments, and especially instruments assuring property, to an infinitely greater extent than are Common law judges. It is not strange, then, that Cozens-Hardy, L.J., should have properly construed the will in *In re Hanbury (supra)*. The astonishing thing is that so able a judge—Common law though he may be—should be so entirely wrong in his construction of it as was Vaughan Williams, L.J. His argument that a gift over was inconsistent with an absolute gift by will under the given circumstances, was simply amazing, considering, as we pointed out, that for years past such gifts have been invariably interpreted in the way the House of Lords has now interpreted the late Mr. Hanbury's will.

Why the case of *Bolitho v. Gidley* (L. R. [1905], A. C. 98), was ever carried to the House of Lords is known only to the unfortunate appellant and his (perhaps) more unfortunate advisers. To hold that a person who has recovered judgment against a married woman is entitled to seize the future income of property settled for her benefit, without power of anticipation, as such income becomes due, would clearly be to put an end for all practical purposes to a restraint on anticipation. But the Married Women's Property Act 1882 expressly preserves such restraint. Therefore, every Court before which the question ever came has held that all the judgment creditor can claim is the income accrued due *before* judgment. The House of Lords affirmed these decisions without calling on the respondents to reply.

Another amazing appeal is that of *Mackenzie v. Allardes* (L. R. [1905], A. C. 285). It also concerns married women's property. There, in a Scotch settlement, there was a clause equivalent to our clause to assign after acquired property, called in Scotch phraseology a "conquest" clause. The Scotch Courts held that such a clause did not include



savings by the wife out of the income of property which was her separate estate. The same thing has been decided as regards the clause as to assigning after acquired property (see *Finlay v. Darling*, L. R. [1897], 1 Ch. 719). How anything else could be held in conformity not merely with law but with elementary common sense is hard to conceive. However, there was an appeal from the Scotch Court's decision, which appeal, it is hardly necessary to say, the House of Lords dismissed.

*National Trustees Company of Australasia Limited v. General Finance Company of Australasia* (L. R. [1905], A. C. 373), is not of authority in English Courts, as it is a decision of the Privy Council, but at the same time, it is one well worth the consideration of English lawyers. It seems that the provision of the Judicial Trustees Act 1893, for the relief of trustees, who, acting honestly and reasonably are, nevertheless, guilty technically of a breach of trust, has been enacted by the Victorian Trusts Act 1901, sect. 3. In the case above cited, the Court held that though the trustees there acted reasonably and honestly, yet, nevertheless, they were not to be excused because they did not, in the opinion of the Court, make sufficient efforts to recover subsequently the money improperly paid away by them, though this is based only apparently on vague considerations. The chief ground for holding the appellants responsible is, that they received remuneration for acting as trustees. It has always been considered hitherto that this fact is absolutely irrelevant (*Jobson v. Palmer*, L. R. [1893], 1 Ch. 91). Of course, the question here was not whether the trustee was legally liable, but whether he ought to be excused for the breach of trust, and it may reasonably enough be contended that the consideration that the trustee was in fact remunerated, and therefore bound morally to be more strict than an unremunerated trustee, should have some weight.

*In re Ambler, Woodhead v. Ambler* (L. R. [1905], 1 Ch. 697), may be and probably is rightly decided, but nevertheless its effect is simply to annul the provision of the Married Women's Property Act 1882 for the prevention of frauds upon a husband's creditors. By section 3 of that Act, where a wife lends money to her husband to be used by him in his business, on the husband's bankruptcy, this is not to be repaid until all other debts based on valuable consideration are fully satisfied. If the husband dies insolvent and his estate is administered by the Court, this section applies. To prevent its application, however, all, according to *In re Ambler (supra)*, that is necessary, is for the husband, by his will, to appoint his wife executrix. The effect of this is not merely to defeat section 3 of the Married Women's Property Act 1882, but to enable the wife to pay her debt in full in priority to those of other creditors. Great is the merit of the ancient right of retainer.

Probably no branch of English law is so much in need of a general and comprehensive revision as that dealing with the administration of assets. Nowhere else has the intervention of the Legislature been so spasmodic and so irresponsible. Numerous isolated sections of various Acts of Parliament apply to it, and each of these seems to have been drafted by a person absolutely ignorant of the previous enactments on the subject. The Courts have been struggling to reconcile statutes which are absolutely irreconcilable, and to make sense out of words which contain no sense. The sooner some intelligent person is retained to make a clear and consistent code as to administration, the better for the public if not for the lawyer, or the fraudulent testator—not by any means as rare a being as might be imagined.

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Judging by *Kine v. Jolly* (L. R. [1905], 1 Ch. 480), the decision of the House of Lords in *Colls v. Home & Colonial Stores, Ltd.* (L. R. [1904], A. C. 179), is likely to be cut down as far as possible by the Court of Appeal. There Vaughan Williams and Cozens-Hardy, L.JJ., following the decision of Kekewich, J., held that, though a new building left a house as well lighted as before in all its rooms save one, and left even that room well lighted, still, because it diminished considerably the lighting of this one room, and so probably reduced the letting or selling value of the house, it constituted an infringement of the plaintiff's easement of light. Romer, L.J., dissented, and in our opinion rightly dissented. The House of Lords in *Colls v. Home & Colonial Stores Ltd.* (*supra*) place the right of action on the ground of nuisance and nothing else. How a building which still leaves another "well lighted" can be called a nuisance, and how the question as to the amount of light previously received, can be relevant to the question of nuisance, is hard to see.

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One step the Court took, and that was to reverse the decision of Kekewich, J., on the point as to issuing a mandatory injunction to remove the obstructing building. It held that the case was one for damages. This is, at any rate, a step in the right direction, and very much in conflict with the law as laid down by Buckley, J., in *Cowper v. Laidler* (L. R. [1903], 2 Ch. 337). (See *Law Magazine*, February 1904, at pp. 223 and 224).

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The doctrine of constructive trusts, as stated in *Keech v. Sandford* (Sel. Cas. Ch. 61), is becoming every day more defined and more restricted. In *In re Biss, Biss v. Biss* (L. R. [1903], 2 Ch. 40), it was lately held not to apply to the case of a person entitled for his own benefit to

a limited interest in a lease, who renews the lease for his own benefit, but merely to the case of a trustee or quasi trustee so renewing. Now, in *Bevan v. Webb* (L. R. [1905], 1 Ch. 620), it has been held not to apply to a trustee or quasi trustee of leaseholds who does not renew, but purchases, for his own interest, the reversion on the lease. Whether this is not carrying the law too far seems open to doubt. The purchase of the reversion by a trustee seems open to all the same objections as the renewal of the lease.

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In *In re Ravensworth, Ravensworth v. Tindale* (L. R. [1905], 2 Ch. 1), the Court of Appeal has held that where a testator bequeaths to each of his servants "a year's wages," this applies only to servants who are paid by the year. Joyce, J., felt bound by authority to hold this, but it is clear he did so very unwillingly. The Court of Appeal, or the majority of it, held that the decision was a very proper one. A plain man would think—what it is hard to doubt the testator intended—that the effect of such words was to give each servant the wages he would receive during a year. How long will it be before some of our judges learn that the proper mode to interpret a will is to read it in the sense a plain man would read it? Whether a servant not hired by the year can have yearly wages is a nice point for logicians and other useful persons, but probably the point never troubled the mind of any person used only to treat affairs in a businesslike way.

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Note that money on deposit is neither ready money nor invested money. *In re Price, Price v. Newton* (L. R. [1905], 2 Ch. 55).

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## SCOTCH CASES.

On a previous occasion we noted somewhat fully the facts and arguments in the Court of Session judgment *Assets Company Limited v. Bain's Trustees* ([1904], 6 Ret. 676, 692). The recent reversal of that judgment by the House of Lords (5th June) has been received in Scotland with much satisfaction. The decision as it stood was harsh and almost cruel in its effect upon beneficiaries under a testamentary trust, and it had also the evil effect of prolonging indefinitely the responsibilities of testamentary trustees. A compromise, in every way regular, between a liquidator and a contributory had been entered into and sanctioned by the Court so far back as 1879, but after the liquidator and the contributory, and most of the parties immediately concerned, were dead, and after the documentary evidence had been in great part lost or destroyed, and the contributory's testamentary trustees had been formally discharged by the beneficiaries, a claim of £63,000 was resuscitated, on the ground that some trifling monetary obligations due to the contributory had been omitted by him in a written statement handed by him to the liquidator. It may well be that the liquidator who had charge of this compromise, and who was one of four, may have been quite aware of the apparent assets referred to, but as this liquidator and nearly all the parties connected with the transaction are dead, it is now impossible to get at the full facts. Had the judgment been allowed to stand, the effect would have been serious, not only to the parties concerned, but to the law of Scotland.

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A peculiarity of the case of *Muirhead & Turnbull v. Dickson* (1st June, 1905, 42 Sc. L. Rep. 578), is that although connected with hire-purchase it was not the ordinary case of a claim by the true owner to vindicate goods attached,

or assigned, or sold, by the creditors of the person to whom they had been delivered, but was a contest between the original contractors themselves. The effect was to bring out in relief the specialties of the contract of hire-purchase apart from the collateral and sometimes embarrassing questions to which the intervention of the interests of creditors gives rise. The article in this case was a piano which the pursuers maintained had been lent on hire by them to the defender for 15s. a month, and the action was for re-delivery in respect that the defender had failed to make the monthly payments. The defender, on the other hand, asserted that the piano was not hired but purchased by him at the fixed price of £26 payable by instalments. The contract was verbal, and therefore, its constitution depended to a large extent upon the evidence of the parties themselves. The result of a proof, as interpreted by the Court, was that though the pursuers had in their own minds a contract of hire-purchase, *i.e.*, a hiring with the option of purchase as explained by the House of Lords in *Helby v. Matthews* (L. R. [1895], A. C. 471), they had not made this clear to the defender, at least they had, on their own admission, used words which were consistent with the contract being understood by the defender to be one of sale. Apart from an interesting commentary on the case of *Helby v. Matthews*, the opinions of the judges are valuable, in so far as they negative a view put forward by the sheriff from whom the case came on appeal. The sheriff referred to (Guthrie) was of opinion that no contract was ever entered into because the parties were not agreed as to the terms upon which the piano was given over, and consequently, that the piano, being the pursuer's property, but in the custody of the defender, must be delivered. In controverting this view Lord M'Laren says: "The ordinary case, what we may call the typical case, of parties being remitted to their original rights in consequence

of no effective contract being entered into, is the case of ambiguity. A case in the House of Lords between landlord and tenant is an instance of that kind (*Buchanan v. Duke of Hamilton* ([1878], 5 Ret. H. L. 69). . . . The common case is where the words of a contract are ambiguous, and it is impossible for the Court to say that each party is not honestly entitled to put his own meaning upon it. But I see no ambiguity in this case. There is here really nothing but a question of evidence."

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The reputed ownership arising in certain circumstances from the possession of movables has given rise to many questions of difficulty. Prominent among these are competitions between a landlord, acting in virtue of his hypothec for rent, and the owners of articles found in the premises leased, but not belonging to the tenant. These cases arise chiefly in the sheriff courts, but occasionally they extend to the Court of Session, as in the recent case of *M'Intosh v. Potts*, (3rd June, 1905, 42 Sc. L. Rep. 576). The point here, however, was a subsidiary one, the main issue, as to whether the right of hypothec existed, being conceded in favour of the landlord. The article was a piano known to the landlord to have been hired by the tenant on the hire-purchase system, and the complaint was that the landlord had sequestrated and sold it for the tenant's rent when more than enough had been realised out of the tenant's effects to pay the rent in arrear and expenses. It was held on the facts that the margin was not so great as to render the sale illegal or oppressive, and that the true owner ought to have applied to the sheriff or to the judge of the roup to have the sale of the piano reserved to the end of the roup; but he had not done so. The chief interest centres in the fact that no attempt was made to resist the landlord's claim of right to sequester (distrain) and sell. On this subject there have been many conflicting judgments in the sheriff courts of Scotland,

but these, though useful, are not judicial precedents. The authoritative judgments of the Court of Session in this branch of the law are somewhat meagre, but they are well brought together and discussed by Sheriffs Mackay and Gillespie in the sheriff-court case, *Dickson v. Singer Manufacturing Company* ([1886], Guthrie's Sel. Cas., 2nd ser., 269). In that case the article (a sewing machine) was, as in the case now under notice, held by the tenant on the hire-purchase system. It was pointed out by the learned sheriffs that there would have been no question had the whole or any large part of the furniture in the house been hired, because the Scots law on the subject is taken from the Roman law, which gave the lessor of an urban tenement a tacit or implied hypothec over all *invecta et illata*, or movables brought into, and found on, the tenement, and not merely over the fruits as in the case of a rural tenement (*Dig. xx, tit. ii*). In the laws of France and Holland, through the medium of which the old Scottish lawyers studied the Roman law, the hypothec covered hired moveables found in the house. There had, however, been a series of sheriff-court decisions in which a distinction was taken between hired furniture generally, and single articles such as a piano or a sewing-machine, and in these cases judgment had invariably been given against the landlord. It was, however, suggested in *Dickson's Case* (*ubi sup.*) that in the previous sheriff-court judgments no reference had been made to *Penon v. Robertson* ([1820], 19 F. C. 147), where it had been expressly held by the Court of Session that a musical instrument lent out for hire is, like hired furniture, liable to the landlord's hypothec for rent.

It is worthy of note, however, that in Scotland the principle of *invecta et illata* in connection with hypothec for rent is not fully carried out. Thus in *Pulsometer Engineering Company Limited v. Gracie* ([1887], 14 Ret. 316), it was held that articles sent to a commission agent for exhibition as samples are not subject to hypothec, and in *Macdonald*



*v. Westren* ([1888], 15 Ret. 988), it was at least questioned whether articles sent on "sale or return" could be attached. The distinction cannot be rested on any question of transfer of ownership, for in true hire the property is not transferred to the person using the goods, any more than it is in the case of goods sent by way of sample, on "sale or return" or "sale on approbation."<sup>1</sup> Again, there is the large question of the goods and effects of lodgers where the furniture of the principal tenant is hypothecated for rent. The Common law of Scotland does not recognise the hypothec as against lodgers, and in this respect it differs from the law of England where it has been thought necessary to protect lodgers by statute (34 & 35 Vict. c. 79). In Scotland, indeed, the landlord's hypothec over the goods of third parties seems to be confined to furniture and other articles lent on hire, so that even the daughter of the tenant, living in family with him, has been enabled to vindicate her right to a piano belonging to herself, as against the hypothec of her father's landlord (*Bell v. Andrews* ([1885], 12 Ret. 961). It seems anomalous that a musical instrument belonging to a stranger should be subject to the hypothec of the landlord of the house in which it is temporarily used, while a similar instrument belonging to a member of the tenant's family escapes.

R. B.

<sup>1</sup> "It is not a question of property, but of the necessary inferences arising from the possession of the goods" (*per* Moncreiff, L.J.-C., in *Macdonald v. Westren, ubi sup.*).

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## IRISH CASES.

In referring to the decision of the King's Bench Division in *Attorney-General v. Jameson* (30 *Law Magazine and Review*, 234), we declared a preference for the opinion expressed in the dissenting judgment of the Lord Chief Baron. The Court of Appeal has now ([1905], 2 Ir. R. 218) varied the order of the King's Bench in a way which,

though not an exact affirmance of the Chief Baron, comes substantially near his position. It will be remembered that the case was concerned with the question as to what value ought, for purposes of estate duty, to be put upon certain shares in a private company. The articles of association subjected the members of the company to considerable restrictions, in regard to the alienation of their shares. This was effected by giving to members a right of pre-emption at a "fair value," over shares of which any member desired to dispose. It was provided that any member proposing to transfer a share should serve on the company a transfer notice. The effect of this was to constitute the company his agent for the transfer of his shares to any other member at their "fair value;" and no shares were to be transferred to any non-member unless the company failed within twenty-eight days to find a member willing to purchase them at this fair value. As the figure fixed by the Company was £100, which was the par value of the shares, and as dividends of 20 per cent. had been paid for many years, it was extremely unlikely that some member would not be found to exercise this right of pre-emption. Section 7 (5) of the Finance Act 1894, directs the value of property for the purpose of estate duty, to be estimated at the price which it would fetch "if sold in the open market at the time of the death." The executors of a deceased member now contended that there was no actual open market for these shares, or at all events, none in which any purchaser would give more than £100, and that therefore the "fair value" must be taken as the real value under this section. The Crown, on the other hand, contended that what passed on the death of a member was in fact something of much greater value than £100 per share, and that, therefore, the value under the section must be estimated by reference to a hypothetical "open market," in which the restrictions by way of pre-emption did not exist. The majority of the

King's Bench Division held in favour of the executors' contention, while the Chief Baron, dissenting, substantially upheld the argument of the Crown. The Court of Appeal decide that both of these extreme views are incorrect, and that the value of the shares ought to be estimated at the price which they would fetch if sold in the open market, but on the terms that the purchaser should be registered as the holder of the shares, and should hold them subject to the articles of association, including the articles relating to the alienation and transfer of the shares. The practical effect of this decision is to recognise the legality of such restrictions on alienation as these articles of association contain.

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*Crofts v. Beamish* ([1905], 2 Ir. R. 349) is principally noteworthy as a case of curiosity, where the Court found itself so divided as to be unable to give any decision. The question was as to the meaning of the words "next eldest brother," in a will. A gift to the testator's sons directed that if any son died before attaining thirty, his share should go to "his next eldest brother, and so on, respectively." Does this mean the brother next senior or next junior to the deceased? One judge of the King's Bench Division thought it meant the next younger brother, one the brother immediately senior to the deceased, and one in despair pronounced the limitation void for uncertainty. As this was not a very illuminating result, the aid of the Court of Appeal was naturally sought: and they decided, apparently in accordance with common sense, that "next eldest" meant the brother next in the descending scale—the next younger brother.

J. S. B.

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## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*Studies in Biblical Law.* By HAROLD M. WIENER, M.A., LL.B.  
London: David Nutt. 1904.

This book is full of curious information and theories, *e.g.*, that the covenant between God and Israel was the theological sanction to obtain respect for the judgments of newly-appointed courts, enforced by the twelve plagues of Deut. xxvii. In chapter iv will be found some interesting parallels with Roman law. The resemblance of the structure of Deuteronomy to that of an English deed under seal (p. 72), is perhaps a little far-fetched. Mr. Wiener is very conservative as a critic, and nearly half the book is an attack on the higher criticism, not always in the best taste. It is rather hard to say of Dr. Driver and other distinguished critics, "their treatment of legal and historical materials is beneath contempt; so are their exegesis and literary criticism" (p. 49). It should be noted that "biblical" includes only the Old Testament; there is no mention of the New.

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*The Digest of Justinian.* Translated by C. H. MONRO, M.A.  
Vol. I, Books I—VI. Cambridge University Press. 1904.

This is the first attempt at a translation of the whole Digest into English, though parts have often been translated, some by Mr. Monro himself. The usual difficulty arises and is discussed by the learned author, the difficulty, that is, of discovering even an approximately correct rendering of Latin technical terms. In the present work some are left untranslated, others are translated with not always happy results, *e.g.*, "threemen" and "vectigalian." Probably few will read the translation who cannot read the original. But for students of the higher Roman Law the book will certainly be useful as a guide and as a labour-saving apparatus.

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*The Annual Statutes 1904.* By J. M. LELY, M.A. London: Sweet & Maxwell. 1904.

*The Practical Statutes 1904.* By JAMES SUTHERLAND COTTON.  
London: Horace Cox. 1904.

The legislative results of 1904 were not very large. Thirty-six Public Statutes were passed; of these Mr. Lely selects twenty-one as

being of practical utility. Mr. Cotton, in his collection, gives one more. There is, as might be expected, very little difference in their lists. Mr. Lely has given the Metropolitan Improvement Funds Act, and the Leeds University Act, which Mr. Cotton has not; while Mr. Cotton has the Post Office Act, the Indian Councils Act, and the Bishoprics of Southwark and Birmingham Act, which Mr. Lely has omitted. Mr. Lely also gives in an Appendix the Witchcraft Act of 1735, and the Manufactured Tobacco Act 1863. The former Act was brought into prominence by the prosecution of the Keiros at the Clerkenwell Sessions in 1904. The most important Acts of the year are the Prevention of Cruelty to Children Act and the Licensing Act. Mr. Lely has not, however, limited himself to Statutes, but gives also in connection with the Education (Local Authority Default) Act, the Prefatory Memorandum and Introduction to Board of Education Code for 1904; the Code itself; Religious Instruction Circular; and Local Government Board Order as to Payment of Rates. He also gives Regulations as to Factories, and the Motor Cars (Use and Construction) Order 1904. Mr. Lely repeats from his Introduction to the Statutes of 1902 his suggestions as to reforms in legislation. Mr. Cotton's little Introductions to the Statutes are very clear and concise.

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*The Law of Savings Banks.* By J. Y. WAIT. London: Butterworth & Co. 1905.

Mr. Brabrook, C.B., late Chief Registrar of Friendly Societies, in a Preface which he has written for this work, well describes it "not merely as a correct statement of the existing law, but also as a guide to the principles upon which the law has been administered in the past by the special tribunal created for the purpose, and as a trustworthy exposition by a person of experience of the methods of official practice." It is not a book which will be of much use to lawyers as practitioners, for they will not get costs from the tribunal which settles disputes as to deposits; in fact we are not sure whether they can appear before the Registrar; but it will be of use and interest to all Savings Bank officials, and all who have deposits in Savings Banks. It is an attempt to consolidate all the Statutes and Regulations on the subject and illustrate them from the thousands of awards that have been made. The Statutes and Regulations are themselves given in full in an Appendix which takes up about half the book. Attention should particularly be paid to the part of

Mr. Watt's work which touches on "the increasing connection of Trustee Savings Banks with local finance."

*The Annual Digest 1904.* By JOHN MEWS. London: Sweet & Maxwell. 1905.

*The Yearly Digest of Reported Cases 1904.* By G. R. HILL, M.A. London: Butterworth & Co. 1905.

One or other of these carefully compiled Digests is necessary to every lawyer who wishes to keep abreast with the decisions of the Courts. These two Digests do not contain exactly the same cases. We do not know how this is to be accounted for in cases decided in the Superior Courts in England, but Mr. Hill also includes reports of cases at Quarter Sessions which Mr. Mews does not. On the other hand, we have found cases from the Irish and other reports in Mr. Mews' Digest which we have not found in Mr. Hill's book.

*A Short View of the Law of Bankruptcy.* By EDWARD MANSON. London: Sweet & Maxwell. 1904.

**Ninth Edition.** *The Principles of Bankruptcy.* By RICHARD RINGWOOD, M.A. London: Stevens & Haynes. 1905.

Mr. Manson has admirably carried out his intention, which is to give an outline of the law of Bankruptcy "which shall be intelligible to the student and business man." It is quite remarkable to find how much information he gets into the small space he has allowed himself. He goes through the subject in chronological order, from "Act of Bankruptcy" to "Arrangements outside Bankruptcy," and a number of well-known authorities are cited. He is not, and does not propose to be, exhaustive. For instance, though he gives a long list of offences by fraudulent debtors which are punishable under the Debtor's Act 1869, yet he does not give the offences created by sects. 13 and 14 of that Act. The section making an undischarged bankrupt obtaining credit to the amount of £20, without disclosing that he is an undischarged bankrupt, guilty of misdemeanour is given, but without any clue to the section or Act from which it is extracted. The index might with advantage be a little more complete.

Mr. Ringwood's book having reached its ninth edition pretty well speaks for itself, and contains as much as can legitimately be described as Principles. It makes a thorough manual for a student, and a very handy book of reference to a practitioner. Though it is

not much more than two years since the last edition was published, the new edition contains nearly sixty new cases, the Rules of 1902 relating to Administration Orders, and the County Court Rules of 1903 as to the Committal of Judgment Debtors. There is an Appendix of nearly 150 pages, consisting mainly of Rules and a few Statutes, among which we find the Bills of Sale Acts "annotated," as Mr. Ringwood hopes, "with as much lucidity as those Acts and the numerous decisions on them permit."

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*Urban Police and Sanitary Legislation 1904.* By F. N. KEEN. London: P. S. King & Son. 1905.

Mr. Keen has with great industry extracted from eleven Private Acts for Local Improvements, promoted by Urban District Councils during the year 1904, such of their provisions as deal with "police and sanitary" matters. The value of such precedents is increased by the fact that all these Acts were considered by what is known as "the Police and Sanitary Committee" of the House of Commons, under the chairmanship of the late Mr. Heywood Johnstone. Many of the members of this Committee have had large experience of this class of work and seek to "standardise" such clauses. The result, a collection of over 800 precedents arranged under suitable headings, with references to the Acts which they form part of, makes a book of precedents of the greatest value "for the use of those engaged in the practical work of legislation, and as a record (possibly having some general interest) of the lines on which legislation is proceeding in various directions."

**Second Edition.** *Roman Law Examination Guide.* By W. ADDINGTON WILLIS, LL.B., and DAVID T. OLIVER, LL.D. London: Butterworth & Co. 1904.

This enlarged and improved second edition will be of some value to the student who does not probe his Roman law too deeply, but simply wants to pass his examination. The question and answer form will enable him to test his knowledge. The answers seem as accurate as can be expected in an elementary work.

**Second Edition.** *A First Book of Jurisprudence.* By Sir FREDERICK POLLOCK, Bart., D.C.L. London: Macmillan & Co. 1904.

The second edition of this well-known work does not seem to contain many additions or alterations. The first edition was pub-

lished as long ago as 1896, and though it was reprinted at the end of that year the stock has probably by this time been sold out. The book was written for the assistance of those students who were beginning the special study of the law, and is divided into two parts. The first is intended to "set forth, in language intelligible to scholars who are not yet lawyers, so much of the general ideas underlying legal discussions as appeared needful for the removal of the most pressing difficulties." The second part is "more practical and more exclusively addressed to students of the Common law," and contains an interesting and instructive account of the sources and authorities of English law. There is a short account of the history of Law Reports, with illustrations of the decline of the Anglo-French language, ending with the extract from Dyer's Reports, where occurs the inimitable passage which describes how the prisoner after his condemnation "jett un brickbat a le justice que narrowly, mist." We may call attention to Sir Frederick's criticism of the present view that the House of Lords should hold itself absolutely bound by its own former decisions.

**Second Edition.** *An Epitome of the Practice of the Chancery and King's Bench Divisions of the High Court of Justice.* By A. H. Pocock. London: Effingham Wilson. 1904.

Mr. Pocock has brought out a new edition of his father's work, which he has carefully revised and considerably added to. Although over 100 additional pages have been included, it still remains a very handy little book. It does not of course pretend to be a rival of the White Book, to which it fully refers. We think it is likely to be of considerable use, but we have not been able to find, at any rate in the index, any information as to trials at Assizes.

**Fourth Edition.** *Poste's Gaius*, revised and enlarged by E. A. WHITTUCK, B.C.L. With an Historical Introduction by A. H. J. GREENIDGE, D.Litt. Oxford: Clarendon Press. 1904.

The names of the coadjutors are sufficient guarantee that the work will be well done. A good deal of the unnecessary jurisprudential matter has been removed and the translation revised. But one still finds the somewhat unsatisfactory renderings of the late Mr. Poste retained in some instances, such as "statute-process," "self-successors," and "trial term," the equivalent of *cum res aguntur*. Here



and there inconsistencies have been allowed to remain in the notes. Thus on page 450 the *condictio furtiva* is not a delictal action, on page 452 it is. The introduction is rather cramped, but that is, as Dr. Greenidge says, because it is an introduction to Gaius and not to Roman law in general.

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**Fourth Edition.** *Law of Property in Land and Conveyancing.* By W. D. EDWARDS, LL.B. London: Stevens & Haynes. 1904.

Considerable additions have been made to this edition without any perceptible increase in the size. The text has been in many places re-written and expanded with the object of giving a more complete statement of the law. The additions include sections dealing with contracts for the sale of land, and clauses of conveyances, mortgages, etc. The most noteworthy addition that we have noticed is, however, caused by the passing of the Land Transfer Act 1897. These additions may be classed under two heads: the first treats of the devolution of real estate on death; and the second, registration of title. The first of these questions, and the decisions thereon are carefully noticed and considered, and an extra part of some thirty pages has been added which discusses the second subject at great length. A considerable number of new cases have been added, and the work has been in every way brought up to date.

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**Sixth Edition.** *Oakley's Divorce Practice.* By WILLIAM M. F. WATERTON. London: Jordan & Sons. 1905.

Mr. Waterton assisted in the preparation of the last edition and is now solely responsible for the present one. This work is not intended as a Treatise on the law of Divorce, but "as a concise and practical Exposition of the ordinary course of procedure in conducting Causes in the Registry." This aim it thoroughly carries out. It is both concise and practical. Full instructions are given as to drawing petitions and other documents. All the necessary forms will be found, and the text of all relevant Statutes, Fees, Costs, etc. A very useful feature in the present edition is the consolidation of the principal reported decisions into one table, arranged in alphabetical order according to the points they deal with. There is a full and good index.

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**Sixth Edition.** *A Compendium of the Law of Torts.* By HUGH FRASER, M.A., LL.D. London: Sweet and Maxwell. 1905.

The rapid succession of editions through which this little book

passes, testifies to the favour with which it is received by the public for whom it was written. We think this favour thoroughly deserved. The work is well arranged, clear and accurate in its statements, and fully calculated to carry out the intention of the Author, as expressed in the preface to the first edition in 1888; namely, to serve "as an inducement to study the Law of Torts in the reported cases and in the various works I have referred to." No new statutes are referred to, but some twenty or so new cases have been added, and about a quarter of the whole is devoted to the subject of Libel and Slander, on which the Author is an acknowledged authority.

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**Seventh Edition.** *Emden's Winding-Up of Companies and Reconstruction.* By HENRY JOHNSTON. London: William Clowes & Sons. 1905.

This edition of a well-known work comes very soon after the last, but was rendered necessary by the issue of the Winding-Up Rules 1903, which consolidated all the former Rules. The Editor has maintained the form of the sixth edition, as experience has satisfied him "that the subject of winding-up lends itself more readily to treatment in chapters than to treatment by annotation of sections of the Acts and Rules." The Statutes and Orders are given in full in the Appendix. The treatment of the subject is very full and complete, and all the recent cases seem to have been added.

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**Eighth Edition.** *Paley's Law and Practice of Summary Convictions.* By W. H. MACNAMARA and RALPH NEVILLE, LL.B. London: Sweet and Maxwell. 1904.

This book was originally published in 1814, and it would be interesting to compare this edition with the first, and notice the many changes that have taken place in those ninety years. It is twelve years since the issue of the seventh edition, and though not many Statutes connected with the subject have been passed in that time, yet, there are at least two important ones, namely, the Public Authorities Protection Act 1893, and the Criminal Evidence Act 1898. Both of these are incorporated in their proper places. Some important cases have been decided, such as *Boulter v. Kent JJ.*, which might flippantly be said to have answered the question, "When is a Court not a Court?" It does not seem to be yet clearly settled whether a Justice is liable to an action for a judicial act when he has jurisdiction over the subject-matter of inquiry. The learned Authors express a

doubtful opinion at the beginning of the section treating on this subject, but further on it would rather seem as if they thought he could not be sued under such circumstances. A rather curious feature of this edition is that the Editors have restored matter which had been omitted in the last edition as obsolete in consequence of the passing of the Summary Jurisdiction Act, 1877. As that Act does not, however, apply to Ireland or the Australian Colonies, the omitted matter has now been restored in compliance with requests from legal practitioners in those countries. We notice in the Appendix the most recent rules of the Secretary of State as to allowances to prosecutors and witnesses. We have not found any reference to the recent case of *R. v. James*, though the early cases on the same point, such as *Thibault v. Gibson*, are given. We think it would be an improvement if in the Table of Statutes the Short Titles were given.

**Twelfth Edition.** *Hayes and Jarman's Concise Forms of Wills.* By J. B. MATTHEWS. London: Sweet & Maxwell. 1905.

Not many law books have a quotation from Shakespeare on the title-page, but this one has, and a very happy one: "Let's choose executors and talk of wills." It requires as much knowledge, and more discrimination, to compose a collection of *concise* forms than one of lengthy precedents, and if well done it is very successful. The present work is an example of how useful carefully drawn concise forms, with good notes, on a subject of general importance, can be. For seventy years Hayes and Jarman's *Concise Forms of Wills* has been consulted and used by the profession, and if it is as fortunate in its editing in the future as in the present and the past, there is no reason why it should not flourish for another seventy years.

**Fourteenth Edition.** *Snell's Principles of Equity.* By A. BROWN, M.A., B.C.L. London: Stevens & Haynes. 1905.

When a text book has reached its fourteenth edition and is established as the best book on its subject, there is not much to be said about a new edition, unless there has been some remarkable change in, or development of, the branch of law treated. All we can expect to find in ordinary cases is that the cases decided since the issue of the last edition have been added, and that if possible, this has been done so as not to much increase the size of the book.

Mr. Brown has been successful in both these aims, as, although he has added a considerable number of cases on various subjects; he has only added seven pages to the text. The fact that considerably more information is given is shown by the increased size of the index—an addition we are always glad to notice—which has been increased by thirty-six pages.

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**Eighteenth Edition.** *Concise Precedents in Conveyancing.* By M. G. DAVIDSON and S. WADSWORTH. London: Sweet & Maxwell. 1904.

An interval of eight years justifies the issue of a new edition of this very useful collection of precedents. We do not notice many changes, but some new precedents have been added, and a general revision made of both precedents and notes. References will of course be found to all the important cases on Conveyancing decided since the last edition. It is interesting to notice what changes or additions have had to be made in forms in consequence of the Land Transfer Acts, and it will, we think, be found that those Acts have not done away with the necessity of contemporaneous unregistered instruments "in all but the simplest cases." "And even in the simplest cases it will be prudent for various reasons to have such an instrument." As a good example of the trouble that has been taken over the notes, when necessary, we call our readers' attention to Precedent LXXVI—Bill of Sale by way of Mortgage of Furniture—where the notes on this most difficult subject are, we should say, quite twenty times as lengthy as the deed they explain. After all the care that has been taken in drawing this form, the Editors think well to give also an exact copy of the statutory form.

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**Twenty-sixth Edition.** *Handy Book on the Formation, Management, and Winding-Up of Joint Stock Companies.* By F. GORE-BROWNE, M.A., K.C., and WILLIAM JORDAN. London: Jordan & Sons. 1905.

The last edition of this work was published in August, 1903, and though there has been no fresh legislation on Companies since then, there are sufficient reasons for bringing out a new edition. The first of these is the issue of a new set of Winding-Up Rules. This has necessitated the re-casting of the chapters dealing with Winding-Up and opportunity has been taken to amplify these chapters at the same time. Another good reason is the number of important cases

decided since August 1903. There has been the very important case on the liability of directors under the Larceny Act 1861, which occasioned Buckley, J., to deliver his judgment as to the circumstances under which the Court will order the liquidator of a Company to institute criminal proceedings. Two other important cases were *Pulford v. Devenish*, in which the liability of a liquidator for not giving notice to creditors before the dissolution of a Company was established, and *Ruben v. Great Fingall Consolidated*, in which the liability of a company for the fraud of its secretary was discussed. A welcome addition will be the section on Secret Commissions. Appendix A contains the regulations of the London Stock Exchange respecting the quotations of new companies; Appendix B, a revised table of Stamps and Fees. Altogether a very good book has been vastly improved.

**Thirty-seventh Edition.** *Stone's Justices' Manual.* By J. R. ROBERTS. London: Butterworth & Co. 1905.

The most important addition to this year's issue of this well-known Manual is the Licensing Act 1904. Of this Act it may be as well to give the learned Editor's opinion: "The Act is drawn in a very loose, inartistic manner and without due regard to the existing law as embodied in the various Statutes comprising the Licensing Acts 1828—1902, which are to be construed as one with the new measure." We are glad, however, to notice that he has a more favourable opinion of the Secretary of State's Rules, "which appear, on the whole, to have been drawn in a careful and comprehensive manner." He concludes his reference to the subject with an appeal for the codification of the Licensing laws, "to interpret which with reasonableness and certainty is a task almost passing the wit of man." The Act is given in full, and is very carefully annotated. It is worth noticing that the Title "Intoxicating Liquor Laws" contains over 110 pages. Other new Statutes included are the Prevention of Cruelty to Children Act; the Shop Hours Act; and the Weights and Measures Act. Various Orders and Regulations are given, such as the Motor Car (Use and Construction) Order 1904; the Heavy Motor Car Order 1904; Regulations as to Allowances payable to Prosecutors and Witnesses, and the Rules under the Poor Prisoners' Defence Act 1903.

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*Markets, Fairs and Slaughter-houses.* By F. N. KEEN. London: P. S. King & Son. 1904.—We have elsewhere referred to Mr. Keen's collection of precedents compiled from the Local Improvement Acts of 1904, and dealing with "Police and Sanitary Matters," and in the volume before us we find another collection giving precedents of legislation with respect to Markets, Fairs and Slaughter-Houses. These precedents have been culled from both the Private Acts and the Provisional Orders obtained by English Local Authorities (outside the Metropolis) in the years 1901, 1902, and 1903. Altogether 25 Acts and 3 Provisional Orders are laid under contribution, and the result is 102 precedents. The collection is a useful one for reference by local officials and draftsmen.

*Handy Book to Solicitors' Costs.* By A. C. DAVES. London: Sweet & Maxwell. 1905.—This is intended as a book of reference to a Solicitor's clerk when engaged in the agreeable occupation of drawing up Bills of Costs. It gives the various items in alphabetical order, with the charge for each. For instance, the first part, which includes Chancery Division—King's Bench Division—and Lunacy, begins with "Acceptance of Service" and ends with "Writ." It covers, besides the heading we have mentioned, proceedings in connection with Companies Winding-Up; Land Clauses Act; Probate, Divorce and Admiralty; Bankruptcy; County Courts; Mayor's Court; Conveyancing and General Business; and Land Transfer Acts. It seems to us likely to be of considerable assistance in the preparation of a full bill of costs.

*The Solicitor's Clerk.* By CHARLES JONES. London: Effingham Wilson. 1905.—This book is composed of two parts bound in one. Part I, which has reached its sixth edition, is on the practical work of a Solicitor's Office, with good advice to a youth entering it as to handwriting and the study of shorthand. It also gives instructions as to the procedure in conveyancing, and the practice of the High Court, County Court, Probate and Bankruptcy. We need scarcely say that there is a chapter on the all-important subject of costs. It is worth noticing the statement that "it is possible for a first-rate man to make a bill of costs come to double the amount that an indifferent hand would obtain from the same materials." Part II, which has now reached its fourth edition, embraces Magisterial and Criminal Law, Licensing, Bankruptcy, Accounts, Book-keeping, etc. In Appendix I there is a glossary of some length giving legal maxims and technical expressions, with their pronunciations when necessary. The solicitor's clerk who carefully reads and digests this book will have acquired a considerable store of useful legal and practical information.

*Charter-parties and Bills of Lading.* By LAWRENCE DUCKWORTH. London: Effingham Wilson. 1904.—Mr. Duckworth is glad his little book has been appreciated, and so are we. It sets out clearly, and with appropriate illustrations from decided cases, many of the most important principles that govern the law of Charter-parties and Bills of Lading. The present (second) edition has been enlarged and contains several important recent cases. The book should be of considerable value to business men connected with shipping. The references in the index to the pages where cases are cited requires a little revision, as in more than one instance the wrong page is given. No reference is given to where the *Arne* is reported. On page 83 it ought to read "In construing the above clauses" not "In constructing the above clauses."

*The Summary Jurisdiction (Married Women) Act 1895.* By S. G. LUSHINGTON, M.A., B.C.L., and GUY LUSHINGTON. London: Butterworth & Co. 1904.—This, the second edition of the Messrs. Lushington's little work, deals with the Act of 1895 as extended by the Licensing Act 1902, and forms a very useful guide to a by no means easy subject. The Authors have, we notice, the satisfaction of being able to point out that a view they took in the first edition has been proved to be correct, and we believe and hope that they may again have the same pleasure when they issue a third edition. The subject is an intricate one, and the more light that is thrown on it the better. We wish the Authors had considered a little more fully the difficulties that arise in respect to an order being made under the Act, when the husband has been convicted on indictment in a superior Court.

*Opinions on Local Government Law in New Zealand.* By T. F. MARTIN. Wellington, Christchurch and Dunedin, New Zealand. Melbourne and London. 1904.—We find here a mine of information for those who want to study the progress of local government in a very progressive colony, and to observe the legal questions that arise in connection therewith. Mr. Martin's introductory notes help us to understand the state of the law under which the questions he has been asked to answer arise, and in some cases both question and answer are given. We notice in one case the answer given is, though doubtless correct, of the shortest, consisting of the emphatic monosyllable, No! It is remarkable that there should be no less than three different systems of rating in New Zealand.

*The Pocket Law Lexicon.* By J. E. MORRIS. London: Stevens & Sons. 1905.—There is much useful information compressed into a few pages in this—the fourth edition—of this work. We do not think that the definition of "liquidated," p. 213, is very happily illustrated: Liquidated "fixed, ascertained; e. g., damages, in contradistinction to a penalty." For it is not in respect of their fixedness that liquidated damages are to be distinguished from a penalty. The "complete" list of law reports is somewhat short and limited.

*A Magisterial Handbook.* By W. H. FOYSTER. London: Effingham Wilson. 1905.—The number of matters with which Justices of the Peace are now concerned is very voluminous, and begins to call for quite a large library in the Petty Sessions Court. But for a first view of the law which he will have to administer we commend the newly-made magistrate to the volume here in question.

*The Law of the Canadian Constitution.* By W. H. P. CLEMENT, LL.B. Toronto: The Carswell Co. Ltd. 1904.—This is a carefully revised second edition of a work of some importance, which may be usefully consulted not only in relation to its immediate subject, but for the purpose of understanding the general relation between the British Imperial Parliament and the Colonial Governments having derivative powers.

*Interpleader by Sheriffs and High Bailiffs.* By D. WARDE. London: Horace Cox. 1904.—This little book contains R. S. C. 1883, Order LVII, the County Court Rules 1903, Order XXXIII, the relevant sections of the Common Law Procedure Act 1860 and the Judicature Act 1884, and a succinct statement of the Case law; and the whole has been brought up to date. The subject is full of pit-falls; and the present volume—the second edition—which will go into the pocket of a capacious waistcoat, will be a useful *vade mecum* to the lawyer.

*The Shop Hours Acts, 1892-1904.* By C. V. BARRINGTON, LL.B. London: Butterworth & Co. 1905.—There is not much Case law on this subject; but it is always convenient to have a small volume containing a collection of statutes on one subject, analysed and indexed. Such a volume is before us. It calls for no special comment, but it is none the less a useful addition to the practitioner's law library.

*A Treatise on the Law of the Stock Exchange.* By W. S. SCHWABE and G. A. H. BRANSON. London: Stevens & Sons. 1905.—The authors tell us that their aim has been "to treat of the business somewhat from the point of view of a lawyer, and of the law somewhat from the point of view of a business man," and in this particular subject the task has been less difficult than in some branches of the law. For it has been the increasing tendency of modern decisions in this branch of litigation to give business results rather than to conform to technical accuracy. But for all this, as appears from a careful reading of the arguments on page 121, the judges will not recognize the rules of the Stock Exchange as if they were the law of the land, but will uphold a rule if reasonable, and if it may be supposed to be known to the contracting parties. The cases illustrating this principle are carefully analysed in the work before us.

*A Digest of Examination Questions.* By R. HALLILAY. London: Horace Cox. 1904.—Although this useful book has been thoroughly revised, and a number of late authorities have been added, the Editor has been able, by weeding out obsolete questions, to reduce the size of the work by sixty pages. Designed probably to fortify the young law student on the brink of his Final Examination, the book—now in its seventeenth edition—is one which may well be of assistance to those further advanced in the law. The principles of every department of our law are in turn dealt with in the form of question and answer; the answers being shortly and concisely given, with references where necessary. In a book primarily intended for students, it would be well to guard against misprints, such as "*in pari delecto*" on page 5. Three lines above we also find the word "payee" where "payer" should be used.

*The Law of Compensation for Unexhausted Agricultural Improvements.* By J. W. WILLIS BUND, M.A., LL.B., and H. STEPHEN. London: Butterworth & Co. 1904.—Mr. Bund originally dealt with this subject in 1876. Since then the law has been amended by the Agricultural Holdings Acts 1883-1900, and the Allotments and Cottage Gardens Compensation for Crops Act 1887. In the present—the third—edition, these Acts are contained together with the decisions upon them up to the present: the Tenants' Compensation Act 1890, the Market Gardeners' Compensation Act 1895, and the Allotments and Cottage Gardens Compensation for Crops Act 1887, have also been added. This is a useful work, of which it is sufficient to say that it has a clear and concise introduction, setting forth the intention and application of the Acts, and appears to contain all the decisions up to the date of its publication.

*The Law of Money Lenders.* By P. HASTINGS. London: Butterworth & Co. 1905.—The author claims for his work that it is the only text-book dealing concurrently with the two forms of relief to which a borrower may be entitled, and



also that it is alone in including the recent decisions of the Court of Appeal extending the application of the Act. In a short but interesting introduction Mr. Hastings shows how fluctuating has been the attitude of the law to usurers. After the expulsion of the Jews in 1290 usury appears to have gradually won recognition until, by an Act of Henry VIII, interest up to 10 per cent. on loans was legalised. In subsequent reigns the rate was reduced till, by 12 Anne, Stat. 2, c. 16, it was fixed at 5 per cent. Then followed the abolition of the Usury laws, and finally, the Money-Lenders Act 1900 gave power to the Court to relieve borrowers, where in a money-lending transaction there is evidence of unfair dealing by the lender, or hard treatment to or advantage taken of the borrower. It is doubtful whether this Act has been of much effect in relieving borrowers, though it has served a useful purpose in making it practically impossible for a lender to conceal his identity. The not very numerous decisions on the Act appear to be contained in Mr. Hastings' book, which also deals efficiently with the procedure.

*The Inventors' Guide to Patent Law and The New Practice.* By J. ROBERTS, M.A., LL.B. London: John Murray, 1905.—Mr. Roberts deals with a large subject in a very small compass. His object is to assist the public, especially in regard to the New Practice of the Official Search under the Act of 1902 now in operation. Of this the Author says that it covers so small a ground that an invention which has passed the ordeal must not be presumed to be a novel one, much less to be useful or of sufficient ingenuity to support a patent. He criticises the Procedure under the Act and forecasts complications which may arise. The book is clearly written, and will prove useful to anyone desirous of grasping an outline of the Patent Laws.

*Registration Handbook.* By G. ABBOTT and G. I. HOLT. London: The Solicitors' Law Stationery Society. 1904.—The Authors describe this—the third—edition of their work as an easy book of reference rather than a text-book, and we think that it will usefully serve that purpose. The first twenty pages are occupied with Concise Instructions as to Voluntary Applications for Title, Transfers, &c., and an epitome of the Land Transfer Rules, while in the last part of the book is set out the Land Transfer Act of 1875, with the Act of 1897, and Rules, Forms, &c., interspersed.

*Evidence in Brief.* By V. KNOWLES. London: Effingham Wilson. 1905.—Mr. Knowles has attempted to give a clear and concise statement of the principles of evidence to students and those who, without strict legal training, are called upon to preside over judicial or quasi-judicial proceedings. The book is unambitious, but seems to fulfil its aim.

*The Relieving Officer.* By J. F. SYMONDS. London: Butterworth & Co. 1904.—Guardians and others may find a use for this little book, which supplies in a concise form the Orders issued by the Poor Law Commissioners, the Poor Law Board and the Local Government Board, on the duties of Relieving Officers. The recent Statutes and Cases on the subject are, in this—the fifth—edition, incorporated with the text.

## CONTEMPORARY FOREIGN LITERATURE.

*Per un Programma di Filosofia del Diritto.* By ALESSANDRO LEVI. Turin. 1905.

This is one of the numerous Italian treatises on the philosophy of law which seem to have a fascination for jurists of that nation. The "gnosological problem" is too transcendental for English readers. But Signor A. Levi makes the most of it as the basis of a connexion between philosophy and law. These abstract questions of jurisprudence have little interest for the general reader unless indeed they be treated by jurists of the first rank, like Savigny or Ihering.

## PERIODICALS.

*Journal du Droit International Privé.* Nos. III—IV. Paris. 1905.

At p. 285 is the first part of a very full discussion of the constitution and procedure of the International Tribunal which dealt with the Dogger Bank incident. Interesting cases are a decision of the *Cour d'Appel* of Nîmes on the introduction of foreign labour to the disadvantage of French industry (p. 391), the recent case of the construction of a settlement in the Belgian Royal family (p. 416), and the double personality of the Khedive as at once chief of the State and a trader owning merchant vessels (p. 434). The last seems very like the well-known case of *The Charkieh*. At p. 464 is a French translation of the Act of Congress of 1902 regulating Chinese labour in the United States.

*Revue de Droit International Privé et de Droit Pénal International.* No. 1. Paris. 1905.

We welcome the appearance of a new review somewhat on the lines of the *Journal*, but dealing in addition, as the title shows, with the specific branch of penal law. There seem to be no English collaborators and only one American, and no English cases are cited. At p. 228 is an article on the recent admission of English as one of the judicially recognised languages in the Egyptian tribunals. The *Revue* does not like it.

*Deutsche Juristen-Zeitung.* Nos. VII—XIII. Berlin. 1905.

One writer contemptuously uses the term *Trinkgeld* for the fee of a French advocate, and suggests that the profession should organise a

better system of payment (p. 344). There is an interesting sketch of the juvenile courts in America (p. 579), and of the constitutional relations of Sweden and Norway (p. 609). A valuable feature of this periodical is the annual digest of judicial interpretations (*Spruchsammlung*) of the Civil Code section by section. That for 1904 extends to 87 pages.

*La Giustizia Penale*. Fasc. xii—xxv. Rome. 1905.

At p. 461 is a curious case showing the extreme refinement of the distinction between injury and defamation. A statement that a tradesman sells sophisticated and poisonous wine is defamation and not injury unless *animus injuriandi* can be proved. Connected with the same subject is the thoughtful article by Professor B. Alimena of Modena, on the treatment of injury and defamation in works of imagination from Dante downwards (p. 841). At p. 473 is a case which will remind English readers of the classical *Somerset's Case*. It was held that a slave landing on the soil of Eritrea becomes *ipso facto* free, even though he was born a slave in a country where slavery is recognised by law.

JAMES WILLIAMS.

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Books received, reviews of which have been held over owing to pressure on space:—Maine's *Ancient Law*; *The Middle Temple Records*; Solberg's *Copyright in Congress*; Stephenson's *Digest for Intermediate Examination of the Law Society*; Ridge's *Constitutional Law of England*; Kelke's *Personal Property Law*; Bateson's *Records of the Borough of Leicester*; Dicey's *Law and Opinion in England*; Pollock's *Indian Contract Act*; Strahan's *Law of Property*; Kerr on *Receivers*; Archbold's *Criminal Pleading, Evidence and Practice*; Fulton's *Law of Patents*; Govt's *Hints as to Advising on Title*; Young's *Corps de Droit Ottoman*.

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Other publications received:—*Neutral Duties in a Maritime War*. By Professor T. E. Holland (Henry Frowde); *Facts about Flogging* (Humanitarian League); *Evidence in Athenian Courts* (University of Chicago Press); Gordon's *The Appellate Jurisdiction of the House of Lords and the Full Parliament* (John Murray); *Justice in Colonial Virginia* (Johns Hopkins Press); *Some Medico-Legal Relations of Intemperance*.

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The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Cafe and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students Journal*, *Bombay Law Reports*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.





